UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON VICINAGE

THE UNITED STATES OF AMERICA, Plaintiff, v. ANNE MILGRAM, in her official capacity as Acting Attorney General of the State of New Jersey, et al., Defendants.	Civil Action No. 06-2683 (FLW)

BRIEF OF DEFENDANTS MILGRAM, NOLAN, AND O'DONNELL IN SUPPORT OF THEIR MOTION PURSUANT TO FED. R. CIV. P. 12(b)(6) TO DISMISS THE COMPLAINT FOR FAILURE TO STATE CLAIM UPON WHICH RELIEF CAN BE GRANTED, OR IN THE ALTERNATIVE TO ABSTAIN

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PRELIMINARY STATEMENT

In introducing the Law Enforcement and Phone Privacy Protection Act of 2006, Representative Lamar Smith aptly noted that "[f]ew things are more personal and potentially more revealing than our phone records. The records of whom we choose to call and how long we speak with them can reveal much about our business and personal lives . . . ." 152 Cong. Rec. E90-01 (daily ed. Feb. 8, 2006). Representative Smith's observation reflects the common understanding that every individual's telephone communications will be free from government surveillance, absent a showing of suspected criminal activity and a judicial sanction for scrutiny. Unfortunately, in recent years, the federal government has invaded the privacy of perhaps millions of Americans by gathering, examining, and analyzing telephone calling records from the nation's major telecommunications carriers, without articulating any level of suspicion of criminal acts and without oversight by the courts.

High-level federal officials and telecommunications company officers have publicly admitted that the National Security Agency ("NSA") regularly receives the telephone calling records of ordinary Americans not suspected of engaging in criminal activity and that government investigators pore through those records to determine the calling patterns of individuals who have done nothing to warrant government investigation. This systematic intrusion on privacy rights was conducted

surreptitiously for nearly five years before being revealed by the press in 2006.

Disclosure of telephone calling records without a court order and without notice to the individual subscribers whose private information is being disclosed could violate New Jersey consumer protection statutes. Once made aware of this potential violation of New Jersey law, the Attorney General of New Jersey initiated an investigation into the practices of telecommunications carriers who operate in this State. To effectuate the investigation, the Attorney General issued subpoenas to various telecommunications companies seeking information on the carriers' history of revealing the telephone calling records of New Jersey subscribers to the NSA.

Before the return date of the subpoenas and with no information having been revealed to the Attorney General by the carriers who are the subject of her investigation, the United States filed suit in this Court seeking, in effect, to enjoin the Attorney General from fulfilling her duty to investigate violations of New Jersey law.[1]

This extraordinary request for relief is based largely on the federal government's assertion of an evidentiary privilege

[1] The Attorney General does not concede the legality of the federal government's telephone calling records surveillance program. New Jersey's investigation, however, is limited to potential violations of New Jersey law by telecommunications carriers.

that prevents the production of sensitive information in limited circumstances. According to plaintiff, even the mere acknowledgment by the carriers of a government surveillance program, already repeatedly acknowledged to exist by federal officials, would threaten national security, justifying suppression of the requested information under the state secrets privilege. Rather than seeking to assert the privilege in a state court enforcement proceeding that may be brought with respect to the subpoenas, plaintiff claims it has an independent cause of action for declaratory relief on the applicability of the privilege to the information sought in the subpoenas. If adopted by this Court, plaintiff's position would transform a court-created evidentiary privilege, to be exercised in rare circumstances after judicial review, into an impenetrable cloak insulating the federal government's domestic surveillance activities from judicial scrutiny.

The federal government's position is legally flawed for several reasons. First, this Court lacks jurisdiction to hear plaintiff's claims. Plaintiff alleges federal question jurisdiction. However, the federal question that plaintiff raises in the Complaint is an anticipated federal law defense to a threatened state court action. No party, including the United States, can create federal court jurisdiction by predicting that a federal question will arise in a state court proceeding.

In addition, neither the state secrets privilege nor any federal statute or Executive Order creates a cause of action based on the potential disclosure of sensitive government information. When properly applied, the state secrets privilege is invoked only after information has been requested in a judicial proceeding and prevents disclosure of information only after a court has examined the materials and determined that the government's claim of a national security threat is genuine. The privilege cannot form the basis for a federal court action to preclude a state official from asking for information that might ultimately be protected from disclosure.

Similarly, the statutes and Executive Orders cited in Plaintiff's Complaint concern the process for classifying, declassifying, and distributing intelligence information. While those laws control the dissemination of classified information, nothing in these provisions gives the federal government a cause of action to seek, in effect, an injunction precluding a State's chief law enforcement official from carrying out her duties.

Moreover, the state secrets privilege does not even apply to the information sought by the subpoenas. Federal officials and cooperating telephone carriers have publicly recognized the existence of the surveillance program. There is no secret for the state secrets privilege to protect.

Also, even if plaintiff has a cause of action, this Court should abstain from deciding this suit. The federal government can raise the state secrets privilege, or any other defense, in a state court proceeding initiated by the Attorney General to enforce the subpoenas. New Jersey's judiciary is entitled to resolve legal issues that arise in subpoena enforcement proceedings free from federal judicial interference, particularly where the State's chief law enforcement officer is investigating potential violations of State law and carrying out her obligation to protect the statutory privacy rights of New Jersey citizens. Of course, any New Jersey judicial decision would ultimately be subject to review by the Supreme Court of the United States.

Finally, the state secrets privilege cannot be applied without the benefit of an in camera review of the information sought by the Attorney General and an opportunity for the Court to determine whether plaintiff's claim of a potential national security threat is genuine. Relief for the plaintiff at this juncture, therefore, would be premature.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On May 11, 2006, a report in USA Today disclosed the existence of the NSA's covert collection of the records of telephone calls placed and/or received by Americans ("Telephone Call History Data") without a showing of suspicion of criminal activity and with no judicial oversight. The report called into question the process by which the information was requested and obtained and raised the concern that New Jersey's consumer protection laws had been violated by telecommunications carriers operating in the State.

In May 2006, the Attorney General of New Jersey commenced an investigation into whether telecommunications carriers providing service to subscribers with a New Jersey billing address and/or telephone number disclosed Telephone Call History Data to the NSA. (Complaint ¶34). Subpoenas Duces Tecum were issued pursuant to New Jersey Consumer Fraud Act, N.J. Stat. Ann. §56:8-1, et seq. (the "Subpoenas") to ten telephone carriers: (1) AT&T Corporation; (2) Cingular Wireless LLC; (3) Qwest Communications International; (4) Verizon Communications; (5) Cellco Partnership d/b/a Verizon Wireless; (6) Virgin Mobile USA, LLC; (7) Vonage Holdings Corporation, Inc.; (8) Nextel Communications, Inc.; (9) Sprint Communications Company;[2] and

[2] Sprint and Nextel have subsequently mergered and are now known collectively as "Sprint Nextel."

(10) United Telephone Company of New Jersey, Inc.[3] (the "Carriers").

The Subpoenas seek: (1) all orders, subpoenas and warrants pursuant to which the Carriers were requested to furnish Telephone Call History Data; (2) an identification of the persons whose Telephone Call History Data was provided to the NSA; (3) a sample of the contract or other form agreement with subscribers which addresses the Carriers' authority to disclose subscriber information to third parties and any obligations prior to such disclosure; and (4) all documents concerning any communication between the Carriers and New Jersey subscribers concerning the NSA request for Telephone Call History Data. The Subpoenas required the Carriers' responses on or before May 30, 2006. (Complaint ¶34, Exh. A).

The State provided the Carriers with an extension of time to June 15, 2006 to respond to the Subpoenas. (Complaint, ¶37). On May 30, 2006, counsel for Sprint Nextel forwarded a copy of Sprint Nextel's privacy policy to the Attorney General and indicated that the company had forwarded the Subpoena to the

[3] United Telephone is now part of Embarq Corporation, which was spun off of Sprint Nextel and is now the parent company for all of Sprint's local telecommunications companies.

United States Department of Justice to seek its position with regard to the remaining requests.[4]

Prior to the return date of the Subpoenas and before the Attorney General could initiate a state court enforcement action, on June 14, 2006, the United States commenced this suit against the Attorney General, the Director of the New Jersey Division of Consumer Affairs, and the Deputy Attorney General who signed the Subpoenas (the "State Defendants"). (Complaint, ¶¶ 5-7). Five of the carriers, AT&T, Verizon Communications, Qwest, Sprint Nextel, and Cingular Wireless were also named as defendants. (Complaint, ¶¶ 8-13). The two carriers that responded to the Subpoenas were not named as defendants. One carrier, United Telephone, did not respond to its Subpoena. Another carrier, Virgin Mobile, did respond to its Subpoena prior to becoming aware that an extension has been granted. At the request of Virgin's counsel, the State Defendants returned the response to Virgin unopened and unread.

The United States seeks a declaratory judgment that the Subpoenas may not be enforced by the State Defendants or responded to by the Carriers "because any attempt to obtain or disclose the information that is the subject of the Subpoenas

[4] Verizon Wireless responded to its Subpoena by stating it had not provided telephone calling records to the NSA. Vonage responded to its Subpoena by stating that other than a sample subscriber agreement, it had no responsive documents.

would be invalid under, preempted by, and inconsistent with the Supremacy Clause . . . federal law, and the Federal Government's exclusive control over foreign intelligence gathering activities, national security, the conduct of foreign affairs, and the conduct of military affairs." (Complaint, Prayer for Relief). Effectively, plaintiff asks this Court to enjoin the Attorney General from carrying out her responsibility to investigate violations of New Jersey's consumer protection laws.

On June 14, 2006, the Attorney General provided the Carriers with a further extension of time to July 17, 2006, to respond to the Subpoenas. Counsel for the Carriers thereafter requested additional time. They were advised that the Attorney General would not agree to any further extensions. On the July 17, 2006, return date, the Carriers neither provided the documentation requested nor otherwise responded to the Subpoenas.

Also on July 17, 2006, counsel for the United States made an application to this Court for a temporary restraining order to preclude the Attorney General from seeking enforcement of the Subpoenas pending the filing and disposition of plaintiff's application for preliminary injunctive relief. At that time, the Attorney General agreed to forebear from any attempts to enforce the Subpoenas and the Court established a briefing schedule for dispositive cross-motions.

The State Defendants now move to dismiss the Complaint for failure to state a claim upon which relief can be granted, or, in the alternative, for the Court to abstain from entertaining plaintiff's claims.[5]

[5] Seventeen class actions have been filed in thirteen federal districts concerning, among other things, the NSA's covert collection of Telephone Call History Data. On August 9, 2006, the Judicial Panel on Multidistrict Litigation found that these actions involve common questions of fact, and pursuant to 28 U.S.C. § 1407 transferred these actions to the Northern District of California for pretrial proceedings. In re NSA Telecoms. Records Litig., 2006 U.S. Dist. LEXIS 56534 (J.P.M.L. Aug. 9, 2006).

ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION TO HEAR PLAINTIFF'S CLAIMS.

The United States invokes this Court's jurisdiction under both 28 U.S.C. §1331 and 28 U.S.C. §1345. (Complaint ¶ 2). Neither statute, however, confers jurisdiction on this Court to entertain plaintiff's claims.

The federal question jurisdiction of 28 U.S.C. §1331 pertains only to "civil actions arising under the Constitution, laws, or treaties of the United States" and, even in Declaratory Judgment actions, not to other federal questions such as those that the United States anticipates may arise as a federal defense to a non-federal action, i.e., an action to enforce the Subpoenas. E.g., Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 152 (1908); Public Service Comm'n v. Wycoff, Co., Inc., 344 U.S. 237, 248 (1952); United States v. Pennsylvania, Dep't of Envtl. Res., 923 F.2d 1071, 1079 (3d Cir. 1991)("[F]ederal defenses to state law claims cannot create federal jurisdiction. . . We are [also] cognizant that the Declaratory Judgment Act does not confer subject matter jurisdiction."). The United States lacks a civil cause of action arising under federal law because federal law does not prevent the State from seeking information that may be privileged by federal law and because, even if it does, the

United States lacks a cause of action to enforce this proscription. See Point II, infra.

Thus, the federal question jurisdiction conveyed to this Court by 28 U.S.C. §1331 affords this Court jurisdiction to determine that the United States does not have a cause of action, e.g., Bell v. Hood, 327 U.S. 678 (1946)(although an allegedly federal claim fails to state a cause of action, when it is pleaded as a federal claim it affords the district court jurisdiction to adjudicate that it does not state a cause of action), but not jurisdiction to adjudicate the state secrets privilege in advance of a state court subpoena enforcement proceeding in which the privilege may be raised as a defense.

Likewise, 28 U.S.C. §1345 neither confers jurisdiction, nor creates a cause of action on behalf of the United States. "Section 1345 authorizes the United States to appear in federal district courts as a party plaintiff but that section assumes that the United States possesses a cause of action that arose under either state or federal law which it can commence in the federal court." United States v. Roche, 425 F. Supp. 743, 745 (D. Mass. 1977). See also United States v. Silliman, 167 F.2d 607, 610 (3d Cir. 1948)(that the statute conveys jurisdiction to the United States to bring suit as a plaintiff does not mean that the United States has a cause of action). Cf. United States v. Pennsylvania, Dep't of Envtl. Res., 923 F.2d at 1079 (holding

that 28 U.S.C. §1345 conveyed jurisdiction to district court to entertain action instituted by the United States seeking adjudication of sovereign immunity defense relating to an underlying action in state court, but without addressing whether claim stated a cause of action). The Complaint, therefore, should be dismissed.

POINT II

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION

The United States cannot convert an evidentiary privilege designed to protect from disclosure limited information concerning national security into a federal cause of action to bar the State's top law enforcement official from carrying out her statutory duties to investigate violations of State law. This distortion of the privilege is unwarranted and does not state a valid cause of action.

In addition, no federal statute or Executive Order prohibits a state official from initiating a state legal proceeding seeking information relevant to potential violations of State law. While it may be that the information sought may ultimately be protected from disclosure, that possibility is not sufficient to vest in the United States a preemptive cause of action to enjoin an attempt to secure the information.

A. Federal Law Does Not Prevent State Officials from Seeking Information That May Be Protected by the State Secrets Privilege.

The state secrets privilege is an evidentiary privilege whose history dates to the beginning of our Republic. The privilege was initially discussed by Chief Justice Marshall who, while riding circuit, adjudicated the trial of Vice President Aaron Burr. Burr had been charged with treason after a confederate, General James Wilkinson, betrayed a plan by Burr and others to seize lands from Mexico in what is now the western United States and establish a new territorial government there. United States v. Burr, 25 F. Cas. 30, 32 (C.C.D. Va. 1807). Burr sought a subpoena duces tecum ordering President Jefferson to turn over a letter Burr believed had been given to the President by Gen. Wilkinson. Id. at 32. President Jefferson opposed Burr's request, citing executive privilege and his belief that he, as executive, maintained the power to decide what communications sent to him as executive were permitted to be released publicly. Id. at 34-35. Chief Justice Marshall ruled in Burr's favor, issuing the subpoena but noting that if the letter "contain[s] any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed." Id. at 37.

The modern-day standard for the state secrets privilege was articulated by the Supreme Court in United States v. Reynolds, 345 U.S. 1 (1953). In that case, the widows of three men who were killed in an aircraft crash brought suit under the Federal Tort Claims Act and sought, in discovery, Air Force records relating to the official investigation of the accident. Id. at 3-4. The Secretary of the Air Force filed a "claim of privilege" and the government refused to produce the documents for in camera review. Id.

In its opinion, the Supreme Court articulated the standard for invocation of the state secrets privilege:

> The privilege belongs to the Government and must be asserted by it . . . . It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.
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> [Id. at 7-8 (footnotes omitted).]

In short, the Reynolds Court created a three-part analysis for the assertion of the state secrets privilege: (1) formal invocation of the privilege by the "head of the department which has control over the matter"; (2) "after personal consideration by that officer"; and (3) a determination by the court that the circumstances are appropriate for the assertion of the claim.

The Court found that the state secrets privilege is properly invoked when "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." Id. at 10 (emphasis added). The privilege requires a judicial determination that balances the court's need to maintain control over the evidence against the reluctance a court should have in requiring the Executive Branch to provide complete disclosure of purportedly privileged information. Id. at 7, 9-10. See also Spock v. United States, 464 F. Supp. 510, 519 (S.D.N.Y. 1978)("the state secrets privilege is only an evidentiary privilege . . . which privilege should be construed narrowly, to permit the broadest possible discovery consistent with the purposes of the privilege.") (citing Kinoy v. Mitchell, 67 F.R.D. 1, 14 (S.D.N.Y. 1975)); Hepting v. AT&T Corp., 2006 U.S. Dist. LEXIS 49955 at *54-55 (N.D. Cal. Jul. 20, 2006)("While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired.").

The Reynolds Court went on to note that the degree to which it may probe in satisfying itself that the privilege is properly invoked turns on the "showing of necessity" made by the party seeking the information sought to be protected. The greater the showing of necessity, the court reasoned, the more reluctant the court should be to accept the assertion of the privilege. 345 U.S. at 11.

The privilege is not an independent basis upon which to authorize the federal court effectively to enjoin state officials from executing their official duties. The privilege is a court-created rule of evidence, not a substantive federal right. The federal government can no more use the privilege to enjoin a state proceeding than could a private litigant move a federal court to stop a state court proceeding on the grounds that he fears the loss of his attorney-client privilege in the course of the state action.

Plaintiff's distorted interpretation of the privilege would effectively immunize federal executive action from judicial scrutiny. Under the unprecedented reading of the privilege advanced here, the Executive Branch could easily escape accountability for any alleged unlawful activity simply by taking refuge behind the state secrets privilege whenever executive authority is challenged and seeking a federal court order barring all further attempts to investigate federal government actions.

The courts maintain the critical responsibility to keenly review federal governmental action that threatens or seeks to thwart fundamental liberties. See also Doe v. Gonzales, 449 F.3d 415, 423 (2d Cir. 2006)(Cardamone, J., concurring)(stating "while everyone recognizes national security concerns are implicated when the government investigates terrorism within our Nation's borders, such concerns should be leavened with common sense so as not forever to trump the rights of the citizenry under the Constitution."); Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)(noting that "in times of conflict, [the United States Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake"). This Court should decline plaintiff's invitation to convert an evidentiary privilege into a cause of action designed to protect to the Executive Branch from scrutiny.

B. Federal Law Does Not Provide the United States with a Cause of Action to Prevent State Officials from Seeking Information That May Be Protected by Federal Statutes or Executive Orders.

Nor do the statutes and Executive Orders cited in the Complaint give the United States a cause of action to prevent the Attorney General from issuing the Subpoenas to investigate violations of state law. The Complaint refers to 50 U.S.C. §403-1(i)(1), which confers on the Director of National Intelligence ("DNI") the responsibility to "protect intelligence sources and methods from unauthorized disclosure." (Complaint ¶30). The

statute goes on to direct the DNI "to maximize the dissemination of intelligence" by establishing "guidelines" for classifying information and preparing intelligence reports. 50 U.S.C. §403-1(i)(2)(A)-(C). Nothing in these provisions give the DNI a cause of action effectively to enjoin a state Attorney General from asking for information that might be insulated from disclosure. If the DNI has any claim to prevent the disclosure of the information sought by the Subpoenas, he can raise that claim in the Attorney General's state court enforcement proceeding.

Similarly, 50 U.S.C. §402 does not authorize the federal government to initiate a federal court action to prevent a state official from seeking information that might be protected from disclosure for national security purposes. (Complaint ¶¶18, 48). Section 6 of the National Security Agency Act, 50 U.S.C. §402, states that:

> [N]othing in this Act or any other law ... shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or the names, titles, salaries or number of persons employed by such agency.
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> [50 U.S.C. §402 note, §6.]

Again, this provision does not provide the independent basis for the relief that plaintiff seeks. Instead, the statute provides an avenue for the DNI to object to the production of the

information sought by the Subpoenas in a state court enforcement proceeding.

The two Executive Orders cited in the Complaint also do not establish for the federal government a cause of action effectively to enjoin a state Attorney General from investigating violations of state law. Executive Order No. 12960, 60 Fed. Reg. 19825 (April 17, 1995), as amended by Executive Order No. 13292, 68 Fed. Reg. 15315 (March 25, 2003), establishes "a uniform system for classifying, safeguarding, and declassifying national security information." While this Executive Order may provide the basis for a claim in a state proceeding that information sought by the Subpoenas cannot be disclosed, it does not create a cause of action for a preemptive ruling on that question.

Executive Order No. 12968, 60 Fed. Reg. 40245 (Aug. 2, 1995) "establishes a uniform Federal personnel security program for employees who will be considered for initial or continued access to classified information." Like the other Executive Orders cited in the Complaint, No. 12968 does not create a cause of action for the federal government. Instead, Executive Order No. 12968 provides a basis upon which the federal government might claim that information requested by the Subpoenas is protected from disclosure.[6]

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[6] The Complaint alleges that 18 U.S.C. §798 is relevant here. That provision makes it a felony to knowingly and willingly divulge to an unauthorized person in any manner "prejudicial to the safety

That federal statutes or federal law create a right or a duty superseding state law by virtue of the Supremacy Clause does not automatically mean that a federal cause of action exists enabling a party -- even the United States -- directly to enforce the right or to impose the duty. E.g., United States v. Cooper Corp., 312 U.S. 600 (1941)(United States, as a purchaser of goods, could not maintain an action under §7 of the Sherman Act authorizing suit for treble damages arising from violations of the Act).

Of course, under the Supremacy Clause, Congress can create both a federal right and a cause of action, but the mere creation of a federal right does not by itself create a cause of action. E.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) ("But even where a statute is phrased in . . . explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private right but also a private remedy.'" (quoting Alexander v. Sandoval, 532 U.S. 275, 286 (2001)); Empire

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or interest of the United States" any classified information "concerning the communication intelligence activities of the United States . . . ." 18 U.S.C. §798(a). "Communication intelligence" is defined as "all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients." 18 U.S.C. §798(b). Because the Subpoenas seek information related only to the federal government's telephone calling records surveillance program, and not its program of eavesdropping on telephone communications, this provision does not appear to apply.

HealthChoice Assur., Inc. v. McVeigh, 126 S. Ct. 2121, 2133 (2006)("It is undisputed that Congress has not expressly created a federal right of action enabling insurance carriers like Empire to sue health-care beneficiaries in federal court to enforce reimbursement rights under contracts contemplated by [the Federal Employees Health Benefits Act of 1959].").

A private party might use 42 U.S.C. §1983 to assert the Supremacy Clause as a cause of action if state law effects a deprivation of a constitutional right. E.g., Roe v. Wade, 410 U.S. 113 (1973), rev'g, Roe v. Wade, 314 F. Supp. 1217 (D. Tex. 1970)(§1983 action seeking on constitutional grounds to overturn state law proscribing abortion). The proper plaintiff in this type of action is a "citizen of the United States or other person within the jurisdiction thereof," 42 U.S.C. § 1983, and not the United States. The United States cannot use §1983 to claim a cause of action in this case.

Similarly, the United States cannot claim a cause of action arising under federal common law. In limited circumstances, federal common law conveys causes of action to the United States. E.g., United States v. Standard Oil Co., 332 U.S. 301, 315 (1947)(declining to create a common-law cause of action allowing the United States to recover from tortfeasors expenses that it incurred in treating military personnel under its health care programs). But

> in the federal scheme [the Supreme Court's] part in th[e] work [of creating common law], and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities . . . .
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> [Id. at 313.]
>
> Generally,
>
> those cases in which judicial creation of a special federal rule would be justified[] . . . are, as we have said in the past, "few and restricted" . . . .
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> [O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)(quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).]

Federal courts, "unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." Northwest Airlines v. Transp. Workers Union, 451 U.S. 77, 95 (1981)(declining to create a common-law cause of action for contribution for Title VII of the Civil Rights Act and for the Equal Pay Act). In Northwest Airlines, the Court defined the scope of its common-law authority in these terms:

> Th[is] Court also has recognized a responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States, or the resolution of interstate controversies. However, we consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is "subject to the paramount authority of Congress."

[Id. at 95 (footnotes and quotations omitted).]

Plaintiff's complaint does not involve "interstate controversies." Id. If court-created federal common law is to convey upon the United States a cause of action to prevent state officials from attempting to obtain information which might be protected from disclosure under federal law, then the power to create that common-law cause of action must instead arise because this case "rais[es] issues of uniquely federal concern [implicating] the definition of rights or duties of the United States." Id. But nothing in this case manifests a need to define the rights or duties of the United States. The right and the duty of the United States - to invoke the state secrets or other federal privileges in the court where privileged materials are sought - is already defined.

In footnote 32 of the Northwest Airlines opinion, appended at the end of the phrase "definition of rights or duties of the United States" included in the above-referenced quotation, id., and informing the meaning of this text, the Court cited three exemplary opinions, only one of which, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), created a cause of action on behalf of the United States.[7] In Clearfield Trust, the

[7] The other two opinions cited in footnote 32 are United States v. Standard Oil Co., (declining to create a cause of action allowing the United States to recover expenses it incurred in treating military personnel treated by tortfeasers) and Miree v.

Supreme Court created a common-law cause of action enabling the United States to recover against a bank for losses incurred when the bank cashed a United States check presented by an unauthorized bearer who forged the payee's signature, notwithstanding the United States' failure to afford the bank timely notice of the forgery as required by Pennsylvania commercial law. In creating a federal common-law cause of action, the Court explained:

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states.
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> [Clearfield Trust, 318 U.S. at 367 (emphasis added).]

Unlike Clearfield Trust, this case presents no reason to create common law, much less a common-law cause of action. The rights and duties of the United States are clear and can be asserted in the forum where privileged materials are sought. See United States v. City of Philadelphia, 644 F.2d 187, 198 (3d Cir. 1980)(United States is "bound to recognize strict limits to its

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DeKalb County, 433 U.S. 25 (1977)(declining to create a cause of action against beneficiaries of airport grant contracts whose breach of the contracts cause injuries to third parties).

power to intervene in the workings of the executive branch of local and state governments" and may not sue to challenge the unconstitutional practices of a city police department on behalf of victimized citizens deprived of their civil rights). Accord United States v. Solomon, 563 F.2d 1121, 1126 (4th Cir. 1977)(enumerating the limited "line of authorities permitting the United States to sue even when not authorized by statute" and holding that the United States has no inherent authority to sue to protect the mentally retarded in state hospitals). Neither statute nor common law gives the United States a cause of action to prevent a state official from pursuing information in a court of competent jurisdiction to adjudicate the alleged federal privilege.

POINT III

SHOULD THE COURT DETERMINE THAT THE STATE SECRETS PRIVILEGE HAS BEEN PROPERLY INVOKED, THE COURT SHOULD FIND THAT THE PRIVILEGE DOES NOT APPLY TO THE DOCUMENTS AND INFORMATION REQUESTED BY THE ATTORNEY GENERAL IN THIS CASE.

The federal government cannot justify application of the state secrets privilege to the information sought by the Attorney General because the telephone calling records surveillance program has already been publicly recognized. The program is not secret. The state secrets privilege, therefore, cannot apply.

The State Defendants concede that the declarations of DNI Negroponte and Lt. Gen. Alexander are sufficient to meet the first two prongs of the Reynolds test - the declarations were made by the "heads" of the departments in question and upon personal consideration of the matter. It is the third prong of the Reynolds test where the federal government's argument fails. The existence of the telephone records surveillance program is already a matter of public record; therefore, compliance with the Subpoenas is not prohibited by the state secrets privilege.

As Judge Walker observed in Hepting, "[T]he first step in determining whether a piece of information constitutes a 'state secret' is determining whether that information actually is a 'secret.'" 2006 U.S. Dist. LEXIS 49955 at *29. On May 11, 2005, USA Today initially reported the existence of the telephone records surveillance program. Leslie Cauley, NSA Has Massive Database of Americans' Phone Calls, USA Today, May 11, 2006. The article detailed a program whereby the NSA, through data provided by AT&T, BellSouth, and Verizon, "has been secretly collecting the phone call records of tens of millions of Americans . . . ." Id. The arrangement, initially characterized as contractual, began shortly after September 11th, 2001, when NSA representatives "told the companies that it wanted them to turn over their 'call-detail records,' a complete listing of the calling histories of their millions of customers." Id. In addition to these records,

the NSA asked "the carriers to provide updates, which would enable the agency to keep tabs on the nation's calling habits." Id. The article also mentioned that one telecommunications carrier, Qwest, after meeting with NSA representatives, chose not to participate in the phone records program. Id.

After the USA Today article was published, additional reporting was conducted by other widely read publications.[8] See, Eric Lichtblau and Scott Shane, Bush Is Pressed Over New Report On Surveillance, The New York Times, May 12, 2006, at A1; Gregg Miller, New Furor Over NSA Logs; National Security Agency Secretly Tracks Millions of Americans' Calls, The Los Angeles Times, May 12, 2006, at A1; Stephen J. Hedges and Mark Silva, Bush: No Laws Were Broken; Millions of Phone Records Reportedly Sold to NSA, The Chicago Tribune, May 12, 2006, at 1; Is The Phone Company Violating Your Privacy?, The Wall Street Journal Online, May 13, 2006; Edward Epstein and Zachary Coile, Bush: Phone Lists Aid Security, The San Francisco Chronicle, May 13, 2006, at A1.

Reaction to the USA Today article varied. Qwest's former CEO, Joseph Nacchio, issued a statement through his attorney confirming the accuracy of the reporting as to Qwest,

[8] A Lexis/Nexis search of this topic indicates that more than 2,000 articles have been written about the phone records program since its disclosure on May 11, 2006. In addition, litigation has commenced in various federal fora. See footnote, p. 9.

noting that "Qwest was approached to permit the Government access to the private telephone records of Qwest customers." Hepting, 2006 U.S. Dist. LEXIS 49955 at *33. The statement went on to discuss an inquiry Mr. Nacchio made to determine whether "a warrant or other legal process had been secured in support of that request." Id. at *34. When he learned no such authority had been acquired, "Mr. Nacchio issued instructions to refuse to comply with these requests." Id.; Leslie Cauley, NSA Has Massive Database of Americans' Phone Calls, USA Today, May 11, 2006.

By contrast, BellSouth[9] and Verizon issued statements challenging the USA Today article. The denials provided by Verizon and BellSouth were not categorical. For example, Verizon limited its denial to a specific time frame -- September 11, 2001 to January 2006 -- and specific business functions, wireless phone, wireless, and directory publishing. Hepting, 2006 U.S. Dist. LEXIS 49955 at *35. Verizon also stated that it "will provide customer information to a government agency only where authorized by law for appropriately-defined and focused purposes." Arshad Muhammed and Terence O'Hara, NSA Program Further Blurs Line on Privacy; Consumers Grow Accustomed to Surrendering Personal Data, The Washington Post, May 13, 2006, at D1. Verizon also stated that it "does not, and will not, provide

[9] BellSouth operated Cingular Wireless as a joint venture with AT&T prior to AT&T's acquisition of BellSouth. Accordingly, BellSouth's public statements are germane to this litigation.

any government agency unfettered access to our customer records or provide information to the government under circumstances that would allow a fishing expedition." Id. Further, Verizon did not deny that it turns over customer data, only that it does not do so unless "authorized by law." Verizon also did not deny that it may grant governmental access to its records, just not "unfettered access." Id.

Similarly, BellSouth denied contracting with the NSA and stated that it did not provide "bulk customer calling records to the NSA." Hepting, 2006 U.S. Dist. LEXIS 49955 at *34. The statement left unclear whether, for example, BellSouth has an informal agreement with the NSA to provide this information, whether the NSA or the Department of Justice ordered BellSouth to provide this information, or whether some information was provided, just not an ill-defined "bulk" amount. The denial provided by BellSouth is certainly open to interpretation as to whether, under certain circumstances, it had (or would) provide this type of information.

AT&T initially chose to neither confirm nor deny that a telephone records surveillance program even exists, much less whether it cooperated with governmental efforts to secure records. Hepting, 2006 U.S. Dist. LEXIS 49955 at *36. Recently, James Cicconi, AT&T's former General Counsel and current Senior Executive Vice President for External and Legislative Affairs,

was quoted as saying that there are "very specific federal statutes that prescribe means, in black and white law, for provisions of information to the government under certain circumstances." Declan McCullagh, AT&T Says Cooperation In NSA Spying Was Legal, CNET News.Com, August 20, 2006, available at http://news.com.com/AT38T+says+cooperation+with+NSA+could+be+legal/2100-1030_3-6108386.html)(last visited September 4, 2006). Mr. Cicconi's comment came in response to a question about protecting customer privacy and the NSA court cases. Id. As reported, Mr. Cicconi's comments suggest that AT&T received a certification from the United States Attorney General that permits a telecommunications carrier to provide "information and facilities to the federal government as long as the Attorney General authorizes it." Id. See also 18 U.S.C. §2511.

Although not named in the USA Today article, Sprint Nextel issued a statement saying "Sprint Nextel is dedicated to protecting the privacy of our customers' communications and complies fully with lawful processes." Scott Leith, BellSouth Faces Lawsuit Over NSA Controversy, The Atlanta Journal-Constitution, May 17, 2006, at C1. Similarly, Vonage stated that "[o]ur position on this issue as it relates to Vonage is pretty clear. We don't supply any government authority with call record data or any sensitive customer information without a subpoena." David Lieberman, Cable Firms: Law Protects Customers; Court

Order, Notification Required, The USA Today, May 12, 2006, at 4B. Of the remaining Carriers served with a Subpoena, neither United Telephone of New Jersey nor Virgin Mobile has provided any on-the-record comment about the phone records program or its possible participation in it.

In short, Verizon, BellSouth and AT&T provided qualified denials of the initial USA Today story that leaves ample room for interpretation. Those companies, along with Sprint Nextel and Vonage, also acknowledged that they comply with lawful requests for information provided by the government. Qwest confirmed crucial parts of the original article while also stating that it did not participate in the phone records program.

After the telecommunications companies' statements were issued, the USA Today reviewed its initial story and published a follow-up article on June 30, 2006. Susan Page, Lawmakers: NSA database incomplete; Some Who Were Briefed About The Database Identify Who Participated and Who Didn't, USA Today, June 30, 2006, at A2. This article has been characterized as a partial retraction of the original story, Hepting, 2006 U.S. Dist. LEXIS 49955 at *36; Frank Ahrens and Howard Kurtz, USA Today Takes Back Some of NSA Phone-Record Report, The Washington Post, July 1, 2006, at A2; Matt Richtel, Newspaper Hedges on Report Of Phone Companies and Data, The New York Times, July 1, 2006, at A13; however, upon closer scrutiny it is clear that the second USA

Today article not only substantiates most of the initial reporting, but provides additional information about the phone records surveillance program that is confirmed both on and off the record by elected officials of the United States Congress.

The second USA Today article said that statements given to the newspaper by members of the House and Senate Intelligence Committees "confirm[ed] some elements of USA Today's report and contradict[ed] others." Id. Much of the reporting centered on a briefing provided by Bush Administration officials to these Committees. Based on those briefings, USA Today reported that "the National Security Agency has compiled a massive database of domestic phone call records," but that "cooperation by the nation's telecommunications companies was not as extensive as first reported by USA Today on May 11." Id. In addition, the article contained both on and off-the-record comments by Senators and Representatives who "verified that the NSA has built a database that includes records of Americans' domestic phone calls." Id.

In sum, the main thrust of the original story - that the NSA has compiled an extensive database of domestic phone records with the cooperation of the telecommunications industry - was verified by elected officials of the United States Government. For example, Senator Saxby Chambliss, a member of the Senate Intelligence Committee, stated that BellSouth's denial

about its participation in the phone records program "appears to be accurate." Id. Senator Chambliss also appeared to confirm the existence of a phone records program when he said. "It's difficult to say you're covering all terrorist activity in the United States if you don't have all the (phone) numbers . . . . It probably would be better to have records of every phone company."[10] Id. (emphasis added). Senator Chambliss also provided indirect confirmation of a phone records program when he stated, "Obviously, a BellSouth customer can contract with AT&T (for long-distance service). There is a possibility that numbers are available from other phone companies." Id. (emphasis added). This suggests that while BellSouth may not have participated in a phone records program, such program does exist and that BellSouth customers who use AT&T as their long-distance provider may have had their calling records turned over to the government.

The USA Today article went on to discuss "new details" in its reporting, quoting Senator Ted Stevens, a member of the Senate Intelligence Committee, as saying

> It was not cross-city calls. It was not mom-and-pop calls, . . . [i]t was long distance. It was targeted on [geographic]

[10] Senator Chambliss's statement references "terrorist activity in the U.S.," not international activity. This qualification would appear to rule out the possibility that Senator Chambliss was speaking about the so-called "Terrorist Surveillance Program," which monitors international calls without a warrant and was recently struck down as unconstitutional. ACLU v. NSA, 2006 U.S. Dist. LEXIS 57338 (E.D. Mich. 2006).

> areas of interest, places to which calls were believed to have come from al-Qaeda affiliates and from which calls were made to al-Qaeda affiliates.
>
> [Id.]

Senator Stevens's characterization of the program presupposes the existence of a program, regardless of whether it was focused solely on long-distance or both long-distance and local calls.

Representative Anne Eshoo, a member of the House Intelligence Committee, also appeared to confirm the existence of a phone records program when she was quoted as saying, in describing the Bush Administration briefing, that there was "schizophrenia in the presentation . . . (officials say) 'It's legal,' but in the same breath they say, 'Perhaps we should take another look at FISA.'" Id. Representative Rush Holt, a member of the House Intelligence Committee, also appeared to confirm the existence of a phone records program when he said "I find it interesting that it seems the government is asking telephone companies to do things that their customers and shareholders would find totally unpalatable." Id. Finally, Senator Orrin Hatch, a member of the Senate Intelligence Committee, also appeared to confirm the existence of a phone records program when he stated, again in response to the Bush Administration briefing, "It was within the president's inherent powers." Id. Much like Senator Stevens's comment, Senator Hatch's comment presupposes the existence of a phone records program.

In addition to these on-the-record statements, the USA Today article included several off-the-record statements attributed to lawmakers who had been briefed by the Bush Administration on the phone records program.[11] For example, the article notes that "[f]ive members of the intelligence committees said they were told by senior intelligence officials that AT&T participated in the NSA domestic calls program." Id. The article further cites nineteen members of the Intelligence Committees as verifying "that the NSA has built a database that includes records of Americans' domestic phone calls." Id. The article also cites three unnamed lawmakers as sources for confirmation that Verizon did not turn over information to the NSA but that MCI (which was acquired by Verizon in January 2006) did.[12] The article went on to quote an unnamed lawmaker as saying "The database is not complete. We don't know if this works yet." Id. Obviously, acknowledging the database's lack of completeness presupposes its existence.

Finally, USA Today also quoted unnamed government officials who had contributed to reporting done by other news agencies, who confirmed the existence of a phone records program,

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[11] The fact that a briefing by Bush Administration officials to the House and Senate Intelligence Committees was reported (and not denied) serves as yet another independent source of confirmation that a phone records program exists.

[12] This statement is consistent with Verizon's denial, which did not include the time period after its acquisition of MCI.

that the government possessed a "gargantuan database" of phone records and that "companies cooperating with the NSA dominate the U.S. telecommunications market and connect hundreds of billions of telephone calls each year." Id. (citing Barton Gellman and Arshad Mohammed, Data on Phone Calls Monitored; Extent of Administration's Domestic Surveillance Decried in Both Parties, The Washington Post, May 12, 2006, at A1; Eric Lichtblau and Scott Shane, Bush Is Pressed Over New Report On Surveillance, The New York Times, May 12, 2006, at A1).

Based on the public reporting and official comments of government officials and telecommunications professionals, it cannot be said that the existence of a phone records surveillance program is a "secret." While it is true that "simply because a factual statement has been publicly made does not necessarily mean that the facts it relates are true and are not a secret," Hepting, 2006 U.S. Dist. LEXIS 49955 at *38, by looking at "publicly reported information that possesses substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security," id. at *39, this Court can find that the existence of a phone records surveillance program is no longer a "secret."

The beginning point for this analysis should be the two articles published by the USA Today. The first article made several general claims: (1) that after September 11, 2001,

Verizon, BellSouth, and AT&T provided the NSA with "'call-detail records,' a complete list of the calling histories of their millions of customers"; (2) that the information was produced under contract; (3) that a fourth telecommunications company, Qwest, was also approached about turning over phone record data but, because of concerns over the legality of the program, refused to participate; and (4) that the call tracking was being done without warrants or approval of the FISA Court. Leslie Cauley, NSA Has Massive Database of Americans' Phone Calls, USA Today, May 11, 2006.

The accuracy of the initial USA Today story can be gauged by looking at subsequent reporting, including the use of official, on- and off-the-record government comments about the phone records program and the statements of telecommunications personnel in a position to speak about the records program. In the Hepting case, Judge Walker held that in determining whether a factual statement is a secret, "the court considers only public admissions or denials by the government, AT&T and other telecommunications companies, which are the parties indisputably situated to disclose whether and to what extent the alleged programs exist." Hepting, 2006 U.S. Dist. LEXIS 49955 at *40-41.[13]

[13] AT&T was the only telecommunications carrier sued in Hepting.

Similarly, in Terkel v. AT&T Corp., 2006 U.S. Dist. LEXIS 50812 at *42 (N.D. Ill. Jul. 25, 2006), Judge Kennelly found that "public admissions by the government about the specific activity at issue ought to be sufficient to overcome a later assertion of the state secrets privilege." The court also noted that "admissions or denials by private entities claimed to have participated in a purportedly secret activity may, under appropriate circumstances, constitute evidence supporting a contention that the state secrets privilege cannot be claimed as to that particular activity." Id. If this Court adopts these standards, it is clear that there is sufficient information in the public record to find that the existence of a phone records program has been confirmed by "parties indisputably situated to disclose" whether the program exists. Hepting, 2006 U.S. Dist. LEXIS 49955 at *40-41.

The second USA Today article provided both on- and off-the-record confirmation that: (1) a phone records program exists; (2) the NSA had collected a substantial amount of phone record data; (3) the phone records program was focused more on long distance phone records rather than local calling records; and (4) one or more long distance telecommunications providers participated in the program. Susan Page, Lawmakers: NSA database incomplete; Some Who Were Briefed About The Database Identify Who Participated and Who Didn't, USA Today, June 30, 2006, at A2.

In keeping with the observations of Judges Walker and Kennelly, the reliability of statements made both on and off the record by elected officials of the United States Congress lend great weight to the initial reporting done by the USA Today and serve to confirm that a phone records program does exist. For example, the article describes a briefing provided to members of the House and Senate Intelligence Committees who, the article noted, had been briefed in secret by intelligence officials "about the program after the story was published," and "described a call records database that is enormous but incomplete." Id. (emphasis added). The phone records program has therefore been confirmed to exist by no less than nineteen members of the Intelligence Committees. Id. In addition, "five members of the intelligence committees" confirmed that "AT&T has participated in the program." Id. Even greater weight can be given to on-the-record statements made by various officials on the Intelligence Committees, which are detailed above. Further support for the veracity of the initial USA Today reporting, and therefore, for confirmation that a phone records program does exist and is therefore not a secret, is found in the statement of former Qwest CEO Joseph Nacchio.

In sum, much of what USA Today initially reported has been confirmed: specifically, that a phone records program exists; that one or more telecommunications companies have

provided phone record data to the NSA; that one telecommunications company, Qwest, was approached to assist the NSA and refused due to concerns over the program's legality; and that the general contours of the program focus on long-distance calls. In light of the amount of information already disclosed, it is folly to suggest that disclosure of the information sought in the Subpoenas would reveal a state secret. See Spock v. United States, 464 F. Supp. at 520 ("Here, where the only disclosure in issue is the admission or denial of the allegation that interception of communications occurred[,] an allegation which has already received widespread publicity[,] the abrogation of the plaintiff's right of access to the courts would undermine our country's historic commitment to the rule of law.").

While the federal government may argue that leaking of information by unconfirmed sources should not be given weight, see, Terkel, 2006 U.S. Dist. LEXIS 50812 at *44-45, the sources cited in the second USA Today article were elected members of the United States Congress, members of Intelligence Committees, not anonymous whistle-blowers or low-level government officials whose access to, or knowledge of, classified information may be questioned. Id. at *42 ("public admissions by the government about the specific activity at issue ought to be sufficient to overcome a later assertion of the state secrets privilege.").

It might also be argued that media reporting that relied exclusively on off-the-record confirmation does not have sufficient indicia of reliability to be considered in determining whether information is a "secret." The USA Today articles, however, include statements of government officials, both on and off the record, in support of the proposition that a phone records program exists. In addition, the former CEO of one of the telecommunications companies named in the article specifically confirmed the central claim of the story - that the federal government sought the assistance of telecommunications providers to turn over voluminous phone records of its customers. The comments of a person with such intimate knowledge, it was noted by Judge Kennelly, "may be considered reliable because they come directly from persons in a position to know whether or not the supposedly covert activity is taking place." Terkel, 2006 U.S. Dist. LEXIS 50812 at *42.

In addition, other statements given by Bush Administration officials provide further support for the fact that a phone records surveillance program exists. For example, Attorney General Gonzales stated that

> [t]here has been no confirmation about any details relating to the USA Today story. Now, the President has confirmed that with respect to domestic collection, none of that is occurring in the United States without a court order. He has also indicated that we understand we have legal obligations in terms of collection of certain kinds of

> information. And those legal obligations are being met. I will say that what was in the USA Today story did relate to business records. As some of you may know the US Supreme Court I believe in 1979 in Smith vs. Maryland held that those kinds of records do not enjoy fourth amendment protection. There is no reasonable expectation of privacy in those kinds of records. There is a statute that deals with -- there is a statutory right of privacy but that statute recognizes that with respect to business records there are a multiple number of ways that the government can have access to that information, to business records and, of course, the government such as the FBI can issue national security letters and obtain them through those means. There are a number of legal ways, of course, that the government can have access to business records.
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> [Transcript of "Operation Global Con" Press Conference, May 23, 2006 available at http://www.usdoj.gov/ag/speeches/2006/agspeech_0605231.html (emphasis added)(last visited Sept. 4, 2006.]

Without confirming the content of the USA Today article, Attorney General Gonzales provided an opinion as to the subject matter of the article, namely that telephone calling records are "business records," and his view that the United States Government does not need to obtain a court order or warrant for access to these business records based on the Supreme Court's decision in Smith v. Maryland. See Smith v. Maryland, 442 U.S. 735 (1979).[14] In

[14] In Smith, the Supreme Court held that a phone company's installation of a "pen register," which recorded the numbers dialed from a suspect's home, at the behest of the police department and without a warrant, did not violate the suspect's Fourth Amendment rights because there is no expectation of privacy for phone numbers

addition, Attorney General Gonzales stated that "with respect to domestic collection, none of that is occurring in the United States without a court order." Transcript of May 23, 2005 Press Conference. Accordingly, contrary to the claim that the Bush Administration has neither confirmed nor denied the existence of a phone records surveillance program, at the very least, it has provided its own opinion that the USA Today article discussed business records which can be obtained without a court order, and that any other "domestic collection" of telephone calling information is done pursuant to court order.

Attorney General Gonzales's comments regarding the means by which these records could be accessed was echoed by National Security Adviser Stephen Hadley who, during an interview on the television program "Face the Nation," stated, "It's really about calling records if you read the story . . . . There are a variety of ways in which those records lawfully can be provided to the government." Susan Page, Lawmakers: NSA database incomplete; Some Who Were Briefed About The Database Identify Who Participated and Who Didn't, USA Today, June 30, 2006, at A2.

Notwithstanding the fact that the existence of a phone records surveillance program has been confirmed by multiple

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a person dials since that information is automatically turned over to the phone company. Smith, 442 U.S. at 744-46. Notwithstanding Attorney General Gonzales's opinion, Smith has been statutorily superseded by 18 U.S.C. §3121(a), which requires a court order before a pen register can be installed.

sources both within the government and the telecommunications industry, if this Court determines that this information has not been publicly disclosed, responses to the Subpoenas should not be prohibited. As Judge Kennelly noted in Terkel, "Disclosing the mere fact that a telecommunications provider is providing its customer records to the government, however, is not a state secret without some explanation about why disclosures regarding such a relationship would harm national security." Terkel, 2006 U.S. Dist. LEXIS 50812 at *25.

As Judge Walker noted in Hepting, when discussing the public statements of the federal government with respect to the warrantless surveillance program:

> If the government's public disclosures have been truthful, revealing whether AT&T has received a certification to assist in monitoring communication content should not reveal any new information that would assist a terrorist and adversely affect national security. And if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements. In short, the government has opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content.
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> [2006 U.S. Dist. LEXIS 49955 at *58-59.]

Judge Walker's opinion should carry equal weight with regard to Verizon and Cingular in the present case. Each has denied providing information to the federal government and by publicly issuing such denials, have opened the door to judicial

inquiry. If the denials are true, then both carriers would be able to respond to the Subpoenas by stating that they have no documents responsive to the requests because they have not participated in any phone records surveillance program. Therefore, there is no danger that having either Verizon or Cingular respond to the Subpoenas will endanger national security because both carriers have denied involvement in the phone records program.

Even if the Carriers were to argue that they did, in fact, have documents responsive to the Subpoenas, but did not provide assistance to the federal government, the documents sought by the Attorney General may not necessarily be privileged and include publicly available information such as Executive Orders and certifications that purportedly would provide legal protection to the telecommunications carriers for providing this information. See generally, Subpoenas ¶¶2, 6, 10, 11; 18 U.S.C. §2511. Conversely, if the public statements of Verizon and BellSouth are untrue, the use of the state secrets privilege to protect this malfeasance is inappropriate.

Similarly, Sprint Nextel has admitted that they comply with lawful requests by the government and safeguard their customers' privacy. As discussed infra, if these statements are true, then responding to the Subpoenas will merely serve to confirm what has already been stated publicly. Alternatively, if

the public statements of Sprint Nextel are untrue, the state secrets privilege should not be used to protect this carrier from making false claims.

Qwest has publicly confirmed that it was approached by the NSA after the September 11th, 2001 terrorist attacks and asked to provide customer call data to the NSA. Hepting, 2006 U.S. Dist. LEXIS 49955 at *34. Qwest has also stated that the records it was being asked to turn over were not being requested pursuant to a court order or warrant. Id. Therefore, Qwest is not in a position to refuse to comply with the Subpoena. The statement of a former chief executive officer is exactly the type of statement that this Court should "consider[] reliable because [it] come[s] directly from [a] person[] in a position to know whether or not the supposedly covert activity is taking place." Terkel, 2006 U.S. Dist. LEXIS 50812 at *42. Indeed, Judge Kennelly, in discussing whether the existence of a phone records surveillance program had been disclosed, described the Qwest statement as coming "somewhat closer to the mark," id. at *50; however, since Qwest was not named in that case as a defendant, Judge Kennelly determined that the statement was not germane to the question of whether AT&T, the sole named telecommunications carrier in that suit, had confirmed or denied the existence of the phone records program. Id. In this case, Qwest has been subpoenaed, is a

potential defendant if it fails to comply, and the statement of former CEO Nacchio can be given full weight by this Court.

With respect to AT&T, while it has chosen to neither confirm nor deny any relationship with respect to the phone records program, Judge Walker has found that "it is not a secret for purposes of the state secrets privilege that AT&T and the government have some kind of intelligence relationship." Hepting, 2006 U.S. Dist. LEXIS 49955 at *56. AT&T's participation in a phone records program has also been confirmed by five members of the House and Senate Intelligence Committees. Susan Page, Lawmakers: NSA database incomplete; Some Who Were Briefed About The Database Identify Who Participated and Who Didn't, USA Today, June 30, 2006, at A2. Finally, AT&T itself has publicly explained its view that there are "very specific federal statutes that prescribe means, in black and white law, for provisions of information to the government under certain circumstances." See Declan McCullagh, AT&T Says Cooperation In NSA Spying Was Legal, CNET News.Com, August 20, 2006 available at: http://news.com.com/AT38T+says+cooperation+with+NSA+could+be+legal/2100-1030_3-6108386.html)(last visited September 4, 2006).

Therefore, it cannot be said that AT&T should be protected from responding to the Subpoenas. For example, at least one other federal court has found that it is permissible to require AT&T to submit any certifications it might have received

from the federal government to assist in the warrantless surveillance of phone calls. Hepting, 2006 U.S. Dist. LEXIS 49955 at *59. Judge Walker also noted that "the public denials by these telecommunications companies [Verizon, BellSouth and Qwest] undercut the government and AT&T's contention that revealing AT&T's involvement or lack thereof in the program would disclose a state secret." Id. at *61. While Judge Walker did not require AT&T to disclose "what relationship, if any, it has with this alleged program," he also noted that "it does not presently conclude that the state secrets privilege will necessarily preclude AT&T from revealing later in this litigation information about the alleged communication records program." Id. at *62.

Vonage has responded to the Subpoena it received and its response shows that a telecommunications carrier is capable of responding in a manner that confirms prior public statements or policy pronouncements. Vonage responded that, other than a form subscriber agreement, it possessed no documents responsive to the various requests. Similarly, Verizon Wireless provided similar responses while referring to its comments in response to the initial USA Today article.

In sum, the existence of a phone records program has been widely reported in the media discussed by government officials and telecommunications officials. The program is not

a secret and the Subpoenas will not force the telecommunications carriers to do anything other than confirm or deny their already public statements regarding their cooperation with the program.

POINT IV

SHOULD THE COURT DETERMINE THAT THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED, THE COURT SHOULD ABSTAIN FROM DECIDING THIS MATTER BECAUSE THE RELIEF REQUESTED BY PLAINTIFF WOULD CONSTITUTE AN UNACCEPTABLE INTRUSION OF FEDERAL JUDICIAL AUTHORITY INTO THE EXECUTION OF STATE GOVERNMENTAL FUNCTIONS.

Federal judicial interference in the Attorney General's ongoing investigation of potential violations of New Jersey's consumer protection and privacy laws is unnecessary to protect the federal government's ability to claim a privilege and would trespass upon the State's sovereignty. Because a state proceeding has begun with the service of the Subpoenas and because the New Jersey courts are available to resolve any claims that the federal government may have with respect to the information sought by the Subpoenas, this Court should abstain from deciding this matter.

A. Concepts of Federalism and Comity Demand That the Federal Judiciary Not Prevent a State Official from Executing Her State Statutory Powers to Protect an Important State Interest.

Our "federalism . . . allow[s] the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all

persons.'" Gonzales v. Oregon, 126 S. Ct. 904, 923 (2006) (nullifying interpretive rule of the United States Attorney General that would have prohibited Oregon's physician assisted suicide)(quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)). New Jersey's consumer protection laws effect an important state interest that is within "the historic police powers of the States." Medtronic, 518 U.S. at 485 (holding that the Medical Device Amendments of 1976 fails to pre-empt state common law actions for negligent manufacturing of pacemakers, and relying in part upon the historically broad police powers possessed by the States to protect the citizenry). In issuing the Subpoenas, the Attorney General has embarked upon a quintessentially state process -- an investigation sanctioned by state consumer protection laws to protect consumers.

1. State Courts Are Competent to Adjudicate Any Privilege Claim Raised by Plaintiff.

Although the Subpoenas are administrative, coercion to effect their enforcement requires a state judicial proceeding in which the state secrets privilege or, for that matter, any other defense to a subpoena can be raised and adjudged. Vornado, Inc. v. Potter, 386 A.2d 1342, 1345 (N.J. Super. Ct. App. Div.), certif. denied, 391 A.2d 503 (N.J. 1978). See also Verniero v. Beverly Hills, Ltd., 719 A.2d 713 (N.J. Super. Ct. App. Div. 1998)(enforcement of subpoena issued by the Attorney General under the Consumer Fraud Act). Both New Jersey administrative

law and the rules of court are generous in admitting participation by non-parties having an interest in the proceedings, see e.g., N.J. Admin. Code § 1:1-16.1, et seq. (intervention or participation by non-parties); New Jersey Court Rule 4:33-1 (intervention as of right); cf. Glukowsky v. Equity One, Inc., 848 A.2d 747, 760 (N.J. 2004)(suggesting that "appropriate federal officer[s] and agenc[ies] [be notified and invited] when a federal law or regulation is challenged in a New Jersey court"); and the United States would be welcome to appear in either administrative or judicial proceedings relating to the enforcement of the Subpoenas and to assert the state secrets or any other privilege. See ACLU v. County of Hudson, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002)(United States invited by court to intervene in action challenging refusal to release names of federal detainees held in county corrections facility). The United States' invocation of the state secrets privilege in state courts is not unprecedented. N.S.N. Int'l Indus., N.V. v. E.I. DuPont de Nemours & Co., 1994 Del. Ch. LEXIS 46, *23 (Del. Ch. Mar. 31, 1994)(affording parties additional time "to determine whether certain facts alleged by plaintiffs are unavailable due to invocation of the states secret (sic) privilege by the United States government").

If the state secrets privilege or any other principle of federal law protects information sought by the Subpoenas and

prevents that information's release, New Jersey courts would afford the United States the protection it seeks because "state courts have the coordinate authority [with federal courts] and consequent responsibility to enforce the Supreme Law of the Land." Howlett v. Rose, 496 U.S. 356, 370 (1990). And even in advance of the termination of the entire investigatory or enforcement proceedings instituted by the Attorney General, the United States would have interlocutory protection in the form of certiorari jurisdiction lying in the United States Supreme Court to correct the New Jersey courts' unlikely error in enforcing the Subpoenas in contravention of federal law. Perlman v. United States, 247 U.S. 7 (1918)(affording non-party immediate appeal of denial of privilege asserted against production of matters in possession of another); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 480-82 & n.10 (1975)(outlining Perlman-like exceptions to the rule requiring finality of state-court judgments as condition of certiorari jurisdiction). See also Pierce County v. Guillen, 537 U.S. 129 (2003)(reversing state-court denial of privilege conferred by federal law for highway data). Thus, by intervening in the state proceedings, the United States

> may assert [its] federal rights and [thereafter, if necessary] secure a review of them by [the United States Supreme] Court. This affords an adequate remedy . . . and at the same time leaves undisturbed the state's administration of [its laws].

[Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 300-01 (1943)(holding that federal courts may exercise discretion to decline declaratory jurisdiction over claims of unconstitutionality in state taxing systems).]

2. Declaratory Relief Is Disfavored and Would Not Resolve Uncertainty Regarding the Carriers' Obligations to Respond to the Subpoenas.

By filing this action, the United States seeks to bypass New Jersey proceedings and obtain in this Court a declaration preventing enforcement of the Subpoenas. This bypass runs counter to the normal practice that the court in control of the proceedings should decide evidentiary issues, including privileges. The normal practice is preferable for many reasons, among which is that most evidentiary issues, including privileges, cannot be decided in a vacuum and must be decided in the context and course of the proceedings in which they arise; hence the superintending court, rather than an external court that is unfamiliar and otherwise unconcerned with the record, should make the decision. This preference has attained constitutional significance in the rule that no court in our federal system is obligated to give full faith and credit to evidentiary rulings, even those pertaining to privilege, of another court. Baker by Thomas v. GMC, 522 U.S. 222, 238 (1998).

This bypass, by which the United States seeks in limine evidentiary rulings binding upon the state judicial system even though the state judicial system is most concerned with the

litigation, is contrary to "Our Federalism," and to the principle that

> the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.
>
> [Younger v. Harris, 401 U.S. 37, 44 (1971).]

Subpoint B, infra, demonstrates that Younger abstention requires dismissal of the Complaint. But the United States seeks declaratory relief, and the "traditional discretion of the federal courts to decide whether to hear declaratory judgment cases is not limited by [abstention doctrines] but will be subject to the liberal interpretation to be accorded the Declaratory Judgment Act." United States v. Pennsylvania, Dep't of Envtl. Resources, 923 F.2d at 1074 (quotations omitted). The Third Circuit has

> made clear that a dismissal appropriate under the broader standard of the Declaratory Judgment Act should be effected without resort to the more limited doctrine of abstention.
>
> [Id.]

The factors guiding a district court in its discretionary decision whether to exercise declaratory jurisdiction at the request of the United States in preference to a parallel state court action is essentially

> a determination of "which [court] will most fully serve the needs and convenience of the

> parties and provide a comprehensive solution of the general conflict."
>
> [United States v. Pennsylvania, Dep't of Envtl. Resources, 923 F.2d at 1075 (quoting 10A Wright, Miller, Kane, Federal Practice and Procedure § 2758 (West 1983)).]

And Third Circuit has enumerated several factors for consideration:

> (1) the likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the controversy;
>
> (2) the convenience of the parties;
>
> (3) the public interest in settlement of the uncertainty of obligation; and
>
> (4) the availability and relative convenience of other remedies.
>
> [Id.]

These factors militate in favor of deference to New Jersey courts in this instance. This Court by declaratory relief cannot definitively resolve uncertainty about the Attorney General's right to secure the information sought by the Subpoenas because even a permanent injunction against the Carriers forbidding them to release the information would lack full-faith-and-credit protection in litigation brought by New Jersey consumers not parties to this action. Baker by Thomas v. GMC, 522 U.S. at 238 ("Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what

witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth."). And it is inconvenient and a disfavored practice for this Court to issue in limine evidentiary rulings pertaining to collateral proceedings over which this Court does not and probably cannot exercise jurisdiction.[15]

Remedies in state court are available and convenient. This Court should decline declaratory jurisdiction in deference and preference to those remedies. The state court is better equipped to resolve privileges and other evidentiary issues pertinent to pending litigation and future litigation that may arise from the Subpoenas.

B. Younger Abstention: the Attorney General Has Initiated State Statutory Investigatory Proceedings in Which the Assertion of the State Secrets Privilege Can Be Resolved. The New Jersey State Courts Are Fully Competent to Review Any Documents and Information for Which the State Secrets Privilege Is Asserted to Determine Whether the Privilege Applies.

Based on notions of equity and comity, the Younger abstention doctrine holds that absent extraordinary circumstances justifying intrusion, federal courts should refrain from taking any action in cases where the federal plaintiff, in effect, asks the court to interfere with state proceedings. Moore v. Sims,

[15] Except in unusual situations (diversity, pendant jurisdiction), this Court lacks jurisdiction over New Jersey consumer protection litigation and cannot assume jurisdiction over the derivative litigation likely spurred by the Subpoenas.

442 U.S. 415, 423 (1979). The United States Supreme Court in Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982), established a three-prong test indicating when this abstention doctrine should apply: if (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims. Id. at 432. Younger applies to this case and requires abstention in deference to state court proceedings superintending consumer protection laws and subpoena enforcement. The United States may assert the state secrets and any other privilege upon which it relies in those proceedings which concern the execution of the Attorney General's important governmental responsibilities to protect New Jersey consumers.

1. The Younger Doctrine Applies When the United States Is a Plaintiff Seeking to Prevent a State Official from the Execution of Her State Statutory Responsibilities.

That the United States is the plaintiff in this action does not create an "extraordinary circumstance[]," Moore v. Sims, 442 U.S. at 432, that overcomes an otherwise valid case for Younger abstention. In Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 n.23 (1976), the Supreme Court expressly left open the question of "when, if at all, abstention would be appropriate where the Federal Government

seeks to invoke federal jurisdiction." The Sixth Circuit has answered this question in the Younger context:

> the presence of the United States as a party to the district court proceeding is irrelevant to the issue of applicability of federal abstention doctrine . . . .
>
> [United States v. Ohio, 614 F.2d 101, 105 (6th Cir. 1979)(applying Younger abstention to reverse the district court's stay of proceedings of the Ohio Board of Tax Appeals).]

The Sixth Circuit explicitly rejected

> the Government's argument that immediate access to a federal forum is needed in this case, simply because the United States cannot be required to submit to the state tax board's jurisdiction. This does not mean that the United States could not intervene in the state proceedings . . . . Further, the fact that the state litigation is before an administrative body and not a state court is without legal significance [because the Government's claims can be raised in that litigation].
>
> [Id. at 104.]

The Fifth Circuit has criticized the Sixth Circuit rule that Younger abstention applies notwithstanding that the United States is a plaintiff. United States v. Composite State Bd. of Medical Examiners, 656 F.2d 131, 136 n.5 (5th Cir. 1981). In the Fifth Circuit's view, the Sixth Circuit is wrong because

> [b]y the time the United States brings suit in federal court against a state, any attempt to avoid a federal-state conflict would be futile. Thus, in most cases invocation of . . . the abstention doctrine, . . . which ha[s] as [its] goal the

> avoidance of federal-state conflicts, would be useless. In other words, by the time federal jurisdiction is invoked the issue has ceased to be one of avoidance of a federal-state conflict; the issue has become one of choosing the proper forum for resolution of the existing conflict.
>
> [Id. at 137.]

However, the Fifth Circuit conceded "that in some cases . . . an argument might be advanced that the state court is the more appropriate forum." Id. at 136 n.6.

The Sixth Circuit has the better argument. In United States ex rel. Trantino v. Hatrack, 563 F.2d 86 (3d Cir. 1977), the Third Circuit held that a district court could not automatically accept a State's waiver of the exhaustion defense against a state prisoner's application for a writ of habeas corpus, but should independently examine the unexhausted claim to determine whether waiver is appropriate. The Third Circuit reasoned:

> Exhaustion is a rule of comity. "Comity", in this context, is that measure of deference and consideration that the federal judiciary must afford to the co-equal judicial systems of the various states. Exhaustion, then, serves an interest not [only] of state prosecutors but of state courts.
>
> [Id. at 96.]

Likewise, Younger abstention, based on comity, is a "measure of deference and consideration that the federal judiciary must afford to the co-equal judicial systems of the

various states." Id. Even if the dispute between the Executive Branches of the New Jersey and United States governments is no longer amenable to "avoidance of a federal-state conflict," Composite State Bd., 656 F.2d at 137, the "measure of deference and consideration that the federal judiciary must afford to the co-equal judicial systems of the various states," Trantino, 563 F.2d at 96, implies that the "issue . . . of choosing the proper forum for resolution of the existing conflict," Composite State Bd., should result in the choice of the forum that normally addresses New Jersey consumer protection litigation and, equally important, that superintends the ongoing proceeding that the United States, in contravention of comity, seeks to interrupt. That forum is the New Jersey judicial system.

2. The Service of Investigatory Subpoenas by a State Official Executing State Consumer Protection Laws Constitutes Initiation of a State Proceeding for Younger Purposes.

As noted, the Younger abstention doctrine requires that under certain circumstances, federal courts must defer to "ongoing state proceedings that are judicial in nature." Middlesex County, 457 U.S. at 432. Although ongoing court proceedings are the norm, ongoing administrative proceedings may also suffice for Younger abstention because

> the concerns of comity and federalism[] which . . . underlie the Younger doctrine[] command the federal courts to respect not only the independence and functioning of the

> state courts, but of the state executive branch as well.
>
> [Williams v. Red Bank Bd. of Educ., 662 F.2d 1008, 1014 (3d. Cir. 1981).]

Thus, Younger abstention applies to administrative proceedings

> where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests . . . .
>
> [Id. at 1017.]

The Attorney General's service of the Subpoenas in this case initiated a state consumer protection investigation to determine whether consumers have been wronged by the actions of Carriers. Although (or especially because) it is nascent, the investigation is ongoing, interrupted only by the Attorney General's consent to stay enforcement of the Subpoenas pending this Court's resolution of the parties' dispositive cross-motions. The investigation of wrongdoing is an "administrative function[]." Texas Ass'n of Bus. v. Earle, 388 F.3d 515 (5th Cir. 2004)(holding that Younger requires abstention in constitutional challenges to state grand jury subpoenas where the subjects of the proceedings can obtain relief in state court). The service of the Subpoenas properly invokes Younger abstention because the consumer protection investigation "reflect strong and compelling state interests," Williams, 662 F.2d at 1017, and because, as noted, the United States can "vindicate federal

claims" in any New Jersey administrative or judicial proceedings brought by the State to enforce the Subpoenas. Id.

The Attorney General's service of the Subpoenas in this case is analogous to the service of grand jury subpoenas or prosecutorial subpoenas in the absence of a grand jury. Service of these subpoenas has uniformly been held to initiate a state proceeding that suffices for Younger. Texas Ass'n of Bus. v. Earle; Craig v. Barney, 678 F.2d 1200 (4th Cir. 1982); Kaylor v. Fields, 661 F.2d 1177 (8th Cir. 1981)(federal court should decline to hear a constitutional challenge to subpoenas issued pursuant to a prosecutor's subpoena power); Law Firm of Daniel P. Foster, P.C., v. Dearie, 613 F. Supp. 278, 280 (E.D.N.Y. 1985); Notey v. Hynes, 418 F. Supp. 1320, 1326 (E.D.N.Y. 1976). Cf. Nick v. Abrams, 717 F. Supp. 1053, 1056 (S.D.N.Y. 1989)("This case requires an inquiry into whether a 'pending state proceeding' exists when a state attorney general executes a search warrant authorized by a judge during a criminal investigation prior to arrest or indictment. For the reasons set forth below, these circumstances constitute a pending state proceeding for Younger abstention purposes."). But see Brennick v. Hynes, 471 F. Supp. 863, 867 (N.D.N.Y. 1979)(holding that the Younger abstention doctrine "does not apply to state grand jury

proceedings where the target for investigation has no immediate recourse to state courts.").[16]

The State Defendants acknowledge that in Cedar Rapids Cellular Tel., L.P. v. Miller, 280 F.3d 874 (8th Cir. 2002), the court held consumer protection subpoenas issued by the Iowa Attorney General did not trigger Younger abstention because

> [a]dministrative proceedings may be judicial for purposes of Younger [only] if they "declare and enforce liabilities" between the parties. The Attorney General's administrative action, however, involves nothing more than an attempt to obtain information . . . .
>
> [Id. at 882.]

However, this holding is unpersuasive because the court neither distinguished nor cited the unanimous caselaw holding that grand jury and prosecutorial subpoenas do trigger Younger abstention, although they are, for Younger purposes, virtually identical to consumer protection subpoenas. Moreover, because, in this Circuit, the concerns of comity and federalism underlying the

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[16] In Monaghan v. Deakins, 798 F.2d 632 (3rd Cir. 1986), the Third Circuit held that the execution of grand jury search warrants as part of an ongoing criminal investigation that had not yet resulted in an indictment was insufficient to constitute an "ongoing state proceeding" for Younger purposes when the subjects of the warrants brought a §1983 suit in federal court challenging the search. Notably, the United States Supreme Court granted certiorari in the case, but the issue was mooted before any decision could be rendered. 484 U.S. 193 (1988). "This [mootness] disposition strip[ped] the [Third Circuit's] decision below of its binding effect." Id. at 200.

Younger doctrine "command the federal courts to respect not only the independence and functioning of the state courts, but of the state executive branch as well," Williams, 662 F.2d at 1014, Younger should apply to the Subpoenas.

3. The Initiation of the State Proceeding Effected by the Service of the Investigatory Subpoenas Meets All of the Elements of Younger Abstention.

Younger abstention applies here because the ongoing proceedings implicate an important state interest and the proceedings afford an adequate opportunity for the federal government to raise the constitutional claims. See Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. at 432; Focus v. Allegheny County Court of Common Pleas, 75 F.3d 834, 843 (3d Cir. 1996)(quoting Port Auth. Police Benev. Assoc., Inc. v. Port Auth., 973 F.2d 169, 173 (3d Cir. 1992)); Schall v. Joyce, 885 F.2d 101, 106 (3d Cir. 1989).

As noted in subpoint A, New Jersey's consumer protection laws effect an important State interest that is within "the historic police powers of the States." Medtronic, Inc. v. Lohr, 518 U.S. 485. Accord Cedar Rapids, 280 F.3d at 879-80 ("The State of Iowa has an important interest in enforcing its consumer protection statutes. None of the appellants dispute this general proposition.").

And both New Jersey administrative law and the rules of court are generous in admitting intervention or participation by

non-parties having an interest in the proceedings. See Subpoint A. That the United States is not now a party to those proceedings is "irrelevant" so long as the United States may join or participate. United States v. Ohio, 614 F.2d at 105. Upon joining or participating, it may raise and obtain adjudication of any objection to enforcement of the Subpoenas, including the state secrets privilege and any other federal privilege. Vornado, Inc. v. Potter, 386 A.2d at 1345. This case belongs in state court, and this Court should decline its discretionary declaratory jurisdiction or abstain under Younger.

POINT V

THIS COURT CANNOT GRANT PLAINTIFF'S REQUEST FOR A FINAL JUDGMENT WITHOUT EXAMINING THE REQUESTED DOCUMENTS AND INFORMATION SOUGHT BY THE ATTORNEY GENERAL TO DETERMINE WHETHER THE STATE SECRETS PRIVILEGE APPLIES.

If this Court finds that the state secrets privilege is properly invoked, it should not defer to the federal government's blanket assertion of that privilege, but instead determine whether or not the Carriers' responses to the Subpoenas pose a genuine threat to national security. At a minimum, in camera review of documents and information allegedly covered by the state secrets privilege has long been utilized by the courts as opposed to a blanket acceptance of the assertion of the privilege.

Courts have recognized that the state secrets privilege is more properly and appropriately invoked on an item-by-item basis rather than based on overly broad categories of information. See e.g., In re United States, 872 F.2d at 478 (rejecting the federal government's sweeping assertion of the state secrets privilege, and reasoning that an "item-by-item determination of [the] privilege will amply accommodate the Government's concerns").

Such review of government domestic security claims is particularly appropriate. United States v. United States Dist. Ct., 407 U.S. 297, 320 (1972); Ray v. Turner, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978). The alternative, noted the Reynolds Court, would permit the Government to classify documents just to avoid their production even though there is need for their production and no true need for secrecy. 345 U.S. at 9-10.

In camera review will allow the Court to distinguish between that which might be legitimately deemed secret and that which poses little to no risk of exposing state secrets. Brown, 619 F.2d at 1173 ("our preliminary in camera examination of the material causes us to conclude that the existence of state or military secrets therein is sufficiently dubious that the formal claim of privilege may not prevail . . . ."). See also Hepting, 2006 U.S. Dist. LEXIS 499 at *8 (Based on the parties' submissions, the court concluded in a June 6, 2006 order that

this case could not proceed, and discovery could not commence, until the court examined in camera and ex parte, the classified documents to assess whether and to what extent the state secrets privilege applies.).

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that this Court dismiss the Complaint for failure to state a claim upon which relief can be granted or abstain from entertaining this matter. Should that relief be denied, the State Defendants respectfully request that this Court deny plaintiff's request for declaratory relief, or, alternatively, examine in camera the documents and information that plaintiff seeks to protect from disclosure.

Respectfully submitted,

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