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10 **UNITED STATES DISTRICT COURT**  
 11 **NORTHERN DISTRICT OF CALIFORNIA**  
 12 **SAN FRANCISCO DIVISION**

13  
 14 IN RE NATIONAL SECURITY AGENCY )  
 TELECOMMUNICATIONS RECORDS )  
 15 LITIGATION )  
 16 \_\_\_\_\_ )  
 This Document Relates To: )  
 17 )  
*United States v. Rabner, et al.* (07-1324); )  
 18 *United States v. Gaw, et al.* (07-1242); )  
*United States v. Adams, et al.* (07-1323); )  
 19 *United States v. Palermino, et al.* (07-1326); )  
*United States v. Volz, et al.* (07-1396); )  
 20 *Clayton, et al. v. AT&T Communications of the* )  
*Southwest, Inc., et al.* (07-1187) )  
 21 \_\_\_\_\_ )

**No. M:06-cv-01791-VRW**  
  
**UNITED STATES' REPLY IN  
 SUPPORT OF MOTION FOR  
 SUMMARY JUDGMENT**  
  
 Date: May 7, 2009  
 Time: 10:30 a.m.  
 Courtroom: 6, 17th Floor  
  
 Chief Judge Vaughn R. Walker

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## INTRODUCTION

1  
2 Congress enacted Section 803 of the Foreign Intelligence Surveillance Act (“FISA”), 50  
3 U.S.C. § 1885b, to ensure that States would “not be involved in regulating the relationship  
4 between electronic communication service providers and the intelligence community.” S. Rep.  
5 110-209 at 14 (accompanying S. 2248, Foreign Intelligence Surveillance Act of 1978  
6 Amendments Act of 2007) (hereafter “SSCI Report”), attached as Exh. A; *see also* 154 Cong.  
7 Rec. S6097-08, 6129 (Statement of Sen. Rockefeller). Citing the very cases before this Court,  
8 Congress found that a number of state regulatory commissions have sought to investigate the  
9 alleged cooperation by state regulated carriers with U.S. intelligence agencies. SSCI Report at 7-  
10 8, 13, 26. In response, Congress amended the FISA to restrict the circumstances in which States  
11 may exercise their regulatory authority over electronic communications service providers by  
12 expressly prohibiting States from delving into whether those carriers provided alleged assistance  
13 to an element of the Intelligence Community. Section 803 provides, *inter alia*, that: “No State  
14 shall have authority to—(1) conduct an investigation into an electronic communication service  
15 provider’s alleged assistance to an element of the intelligence community; (2) require through  
16 regulation or any other means the disclosure of information about an electronic communication  
17 service provider’s alleged assistance to an element of the intelligence community.” *See* 50 U.S.C.  
18 § 1885b(a)(1)-(2). Section 803 expressly and unambiguously preempts the authority of State  
19 Officials in the above-captioned actions to undertake the state investigations at issue in this  
20 litigation. Section 803 clearly applies here and entitles the United States to summary judgment.

21 The State Officials oppose summary judgment for two reasons. First, they argue that  
22 Section 803 violates principles of state sovereignty and the Tenth Amendment. Second,  
23 selectively citing certain examples of what they seek from the carriers, the State Officials claim  
24 that their investigations are not preempted by Section 803. Neither argument has any merit.  
25 Contrary to the State Officials’ contention, Supreme Court precedent establishes that there is no  
26 infringement of state sovereignty or encroachment on Tenth Amendment interests where  
27 Congress directly preempts state law in an area that is plainly within the constitutional powers of  
28 Congress and the Federal Government. Moreover, the State Officials’ alternative contention—  
that, even if Section 803 presents no constitutional concern, their investigations do not fall within

1 Section 803—cannot withstand scrutiny; even a cursory review of the undisputed record in these  
2 cases establishes that these investigations fall squarely within and are preempted by Section 803.

### 3 ARGUMENT

#### 4 **I. SECTION 803 DOES NOT VIOLATE THE TENTH AMENDMENT OR** 5 **PRINCIPLES OF STATE SOVEREIGNTY.**

6 The State Officials do not dispute that Section 803 is an express statutory preemption on  
7 their investigations, but contend that it is an “unconstitutional encroachment on state  
8 sovereignty” reflected in the Tenth Amendment. *See* State Opp. at 4-5, n.3. They assert that  
9 Section 803 violates general Constitutional principles recognizing that states are independent  
10 sovereign entities, *see id.* at 5-6, and specifically intrudes on the states’ traditional authority to  
11 regulate intrastate matters involving telecommunications carriers and the privacy of their citizens,  
12 *see id.* at 7-8. These arguments misrepresent Tenth Amendment jurisprudence, as well as the  
13 nature of the state actions at issue and the authority of Congress to protect the interests of the  
14 Federal Government.

15 The Tenth Amendment’s reservation of power to the states does not apply to powers  
16 “delegated to the United States by the Constitution.” *See* U.S. Const. amend X; *New York v.*  
17 *United States*, 505 U.S. 144, 155-56 (1992). “The States unquestionably do retain[n] a  
18 significant measure of sovereign authority . . . to the extent that the Constitution has not divested  
19 them of their original powers and transferred those powers to the Federal Government.” *New*  
20 *York*, 505 U.S. at 156 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549  
21 (1985)). Thus, the question is not whether states are sovereign entities, but whether Congress  
22 had authority to enact Section 803 to preempt the state investigative actions at issue. That is  
23 undoubtedly the case. The Constitution vests in the Federal Government power over the national  
24 security and foreign affairs of the United States. *See United States v. Pink*, 315 U.S. 203, 233  
25 (1942) (“Power over external affairs is not shared by the States; it is invested in the national  
26 government exclusively.”); *see also Murphy v. Waterfront*, 378 U.S. 52, 76 n.16 (1964) (“the  
27 paramount federal ‘authority in safeguarding national security’ justifies ‘the restriction it has  
28 placed on the exercise of state power’”); *Ullmann v. United States*, 350 U.S. 422, 435-36 (1956).  
Section 803 of the FISA, on its face, seeks to foreclose state investigations into the alleged

1 involvement of telecommunication carriers in alleged federal intelligence matters and, thus, that  
2 provision regulates in an area that is entrusted by the Constitution to the Federal Government.

3 It is irrelevant that states have also some authority over intrastate carrier activities.

4 Where Congress acts pursuant to its constitutional authority, it may preempt state law or action,  
5 and that Federal law governs the actions of state officials pursuant to the Supremacy Clause.

6 U.S. Const., Art. VI, cl. 2; *see New York*, 505 U.S. at 160, 168. The State Officials do not claim  
7 that Congress lacked any constitutional authority to enact Section 803. Indeed, it is indisputable  
8 that, even outside the national security context, Congress has authority to regulate

9 telecommunication carriers acting in interstate commerce and to preempt state and local  
10 standards governing such activities. *See City of New York v. FCC*, 486 U.S. 57, 65-70 (1988).

11 Once Congress has acted pursuant to powers entrusted by the Constitution to the Federal  
12 Government, no authority is reserved in the states under the Tenth Amendment and state  
13 sovereign actions are preempted by Federal law. *See FERC v. Mississippi*, 456 U.S. 742, 758-59  
14 (1982) (No Tenth Amendment issue is presented where Congress has authority to displace state  
15 regulation, even where this serves to “curtail or prohibit the States’ prerogatives to make  
16 legislative choices respecting subjects the States may consider important.”) (quoting *Hodel v.*  
17 *Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 290 (1981)).

18 Also meritless is the State Officials’ contention that Section 803 constitutes the type of  
19 impermissible violation of state sovereignty invalidated in cases such as *New York v. United*  
20 *States, supra*, and *Printz v. United States*, 521 U.S. 898 (1997). *See State Opp.* at 5-9. Neither  
21 decision limits Congress’ authority to preempt state law entirely or in part. Rather, *New York*  
22 and *Printz* simply hold that the federal government cannot “commandeer” state legislative  
23 processes or conscript state executive officials to enact or administer a federal program.

24 In *New York*, the Court struck down certain provisions of the Low-Level Radioactive  
25 Waste Policy Amendments Act of 1985 that required the states to choose between providing for  
26 the disposal of all low-level radioactive waste generated within the state and taking title to that  
27 waste. The Court concluded that “[e]ither way, ‘the Act commandeers the legislative processes  
28 of the States by directly compelling them to enact and enforce a federal regulatory program[.]’”  
505 U.S. at 176 (quoting *Hodel*, 452 U.S. at 288). Similarly, in *Printz*, the Court applied the

1 holding and rationale of *New York* to strike down interim provisions of the Brady Handgun  
2 Violence Prevention Act that required local officers to conduct background checks on handgun  
3 purchasers. The Court found the case governed by its holding “in *New York* that Congress  
4 cannot compel the States to enact or enforce a federal regulatory program.” *See Printz*, 521 U.S.  
5 at 935. The defect of the statutes at issue in *New York* and *Printz* was that they compelled state  
6 officials to affirmatively carry out federal regulatory programs. *See id.* at 926-28.

7 Section 803, in contrast, does not require States to enact legislation, or commandeer state  
8 officials to enforce federal law—indeed, it does not require the States to do *anything*. *See Reno*  
9 *v. Condon*, 528 U.S. 141, 151 (2000). Rather, Congress has preempted state law to foreclose  
10 states from investigating or demanding disclosure of information related to “alleged assistance to  
11 an element of the intelligence community.” *See* 50 U.S.C. § 1885b(a)(1)-(2). The State  
12 Officials’ contention that this “distinction” between Section 803 and the statutes invalidated in  
13 *New York* and *Printz* “is of no constitutional significance,” State Opp. at 8, is clearly wrong; in  
14 fact, the distinction is critical. Tenth Amendment concerns arise where Congress seeks to require  
15 the states to regulate or to enforce federal regulations, but not where Congress exercises its  
16 authority to regulate matters directly and preempt state law. *See New York*, 505 U.S. at 178; *see*  
17 *also Okla. ex rel. Okla. Dep’t of Pub. Safety v. United States*, 161 F.3d 1266, 1269-72 (10th Cir.  
18 1998) (“the Court has yet to hold that a federal law, which directly regulates state activity and  
19 necessitates some state legislative or administrative action to achieve compliance, amounts to  
20 unconstitutional “commandeering.”). This case falls squarely within the principle that federal  
21 law may displace state regulation even though this serves to “curtail or prohibit the States’  
22 prerogatives to make legislative choices respecting subjects the States may consider important”  
23 *Hodel*, 452 U.S. at 290, and it would be a “radical departure” to hold otherwise. *See id.* at 292.

24 *Printz* confirmed a related principle, enunciated in *FERC*, that Congress may condition  
25 the states’ continued regulation in a preemptible field on the states’ compliance with affirmative  
26 obligations imposed by federal law. In *Printz*, the Court reaffirmed that the rule against  
27 commandeering is not violated when Congress “impose[s] preconditions to continued state  
28 regulation of an otherwise pre-empted field . . . .” 521 U.S. at 929; *see FERC*, 456 U.S. at 765  
(upholding federal requirement because it simply placed a condition on “continued state

1 involvement in a pre-emptible area . . .”).<sup>1</sup> By limiting the grounds of legitimate state inquiry to  
2 exclude alleged assistance to elements of the Intelligence Community, Section 803 simply  
3 imposes an important condition on state involvement in a pre-emptible area and thus is clearly  
4 permissible.

5 The State Officials’ related contention that Section 803 violates sovereign state police  
6 powers to “regulate the Carriers and protect their citizens’ privacy” or other “traditional  
7 functions,” *see* State Opp. at 7-8, is likewise meritless. “The relative importance to the State of  
8 its own law is not material when there is a conflict with a valid federal law, for the Framers of  
9 our Constitution provided that the federal law must prevail.”<sup>2</sup> *Free v. Bland*, 369 U.S. 663, 666  
10 (1962). Moreover, the State Officials’ argument would raise clear constitutional conflicts  
11 whenever federal law affects so-called “traditional functions” of state governments. The  
12 Supreme Court “long ago rejected the suggestion that Congress invades areas reserved to the  
13 States by the Tenth Amendment simply because it exercises its authority under the Commerce  
14 Clause [or other constitutional authority] in a manner that displaces the States’ exercise of their  
15 police powers.” *Hodel*, 452 U.S. at 291. Thus, for example, the Ninth Circuit has invalidated  
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17 <sup>1</sup> The *Printz* Court also reaffirmed another principle from *FERC*—that the rule against  
18 commandeering is not violated when a statute “require[s] state administrative agencies to apply  
19 federal law while acting in a judicial capacity.” *Printz*, 521 U.S. at 929 & n.14. In *FERC*, the  
20 Court reviewed the Public Utility Regulatory Policies Act of 1978 (“PURPA”) that required local  
21 regulatory authorities to implement federal rules, a requirement that the local authorities could  
22 satisfy by adjudicating disputes arising under the federal act. 456 U.S. at 760. The Court found  
23 the validity of that statutory requirement to be controlled by *Testa v. Katt*, 330 U.S. 386 (1947),  
24 which had established that state courts of competent jurisdiction are not free to close their doors  
25 to claims arising under federal law. The *FERC* Court found that state administrative decision  
26 makers who form part of the state’s adjudicatory machinery are bound, like state judges, to apply  
27 federal law. *FERC*, 456 U.S. at 759-61. “Any other conclusion would allow the States to  
28 disregard both the preeminent position held by federal law throughout the nation . . . and the  
congressional determination that the federal rights granted by PURPA can appropriately be  
enforced through state adjudicatory machinery.” *Id.* at 761.

<sup>2</sup> Even if, in some cases, there might be a presumption against preemption when  
Congress regulates in areas affecting certain state police powers, it would not apply here. The  
Ninth Circuit has held that such a presumption does not apply in the field of telecommunications  
—let alone the national security field at issue—because of “the long history of federal presence.”  
*See Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003).

1 state regulatory orders on preemption grounds, even where traditional police powers are  
2 concerned, despite the undisputed “authority of a state [Public Utility Commission] to establish a  
3 reasonable rate of return for utilities within its jurisdiction” because of conflict with federal  
4 prerogatives. *See Hawaiian Tel. Co. v. Pub. Util. Comm. of State of Hawaii*, 827 F.2d 1264,  
5 1275-77 (9th Cir. 1987) (preemption of state rate order upheld).<sup>3</sup>

6 Finally, the State Officials make a series of related arguments premised on the states’  
7 perceived deficiencies with the scope of Section 803, such as that it is overbroad, a concept  
8 relevant to First Amendment jurisprudence, *see* State Opp. at 10-11, or that Congress could have  
9 drafted Section 803 with more “safeguards” like those found in Section 802,<sup>4</sup> *see id.* at 12-13, or  
10 that Section 803 should have struck a different “balance” between state and federal law, *see id.* at  
11 14. The State Officials cite no authority for any such proposition applicable to statutory  
12 preemption analysis. Rather, when Congress acts pursuant to its constitutional powers, the  
13 states’ interests are protected by “the built-in restraints that our system provides through state  
14 participation in federal government action,” not by “judicially created limitations on federal  
15 power.” *Garcia*, 469 U.S. at 550-52, 556. In any event, Section 803 strikes a narrow balance  
16 between Federal and State authority by carving out a limited area where the states cannot regulate  
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19 <sup>3</sup> Even the few preemption cases cited by the State Officials, *see* State Opp. at 7, do not  
20 aid their argument. *Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm’n.*, 461 U.S.  
21 375 (1983), held only that the federal laws at issue in that case did not preempt state regulation of  
22 the utility market, not that Congress could not preempt such state regulation. *Id.* at 385-90.  
23 Rather, the Court noted that had Congress, or a federal agency, concluded that state regulation  
24 was inconsistent with federal policy, such federal action “would *of course* preempt any further  
25 exercise of jurisdiction” by state regulators. *Id.* at 390 (emphasis added). Moreover, *New*  
26 *Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989), held only that state  
27 interests were *not* weighty enough for a federal court to be required to abstain from a preemption  
28 challenge to a state regulation of a utility.

29  
30 <sup>4</sup> The hypothetical situations that could arise if electronic communication service  
31 providers were to attempt any abuse of Section 803 by claiming that an inquiry involves an  
32 element of the Intelligence Community, *see* State Opp. at 11, do not merit any different result.  
33 Here, no such hypothetical is at issue. Moreover, outside of the First Amendment context, courts  
34 cannot facially invalidate an Act of Congress based on some hypothetical possibility. *See*  
35 *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190-91  
36 (2008).

1 electronic communications service providers—when they seek information from or attempt to  
2 investigate alleged federal intelligence activities. *See* SSCI Report at 13 (expressing Congress’  
3 desire to “protect[] . . . the federal government’s ability to conduct intelligence activities without  
4 interference by state investigations”). That the State Officials disagree with the balance Congress  
5 struck does not render Section 803 unconstitutional. *See Garcia*, 469 U.S. at 556; *South*  
6 *Carolina v. Baker*, 485 U.S. 505, 512 (1988).<sup>5</sup> Section 803 is constitutional and, as we now  
7 show, applies here.

8 **II. DESPITE THE STATES’ CLAIMS TO THE CONTRARY, CONGRESS**  
9 **CLEARLY INTENDED THAT SECTION 803 APPLY IN THESE CASES TO**  
10 **PREEMPT THESE STATES’ INVESTIGATIONS AND PROCEEDINGS.**

11 In deciding whether a federal law preempts a state statute or action, a court’s task is to  
12 “ascertain Congress’ intent in enacting the federal statute at issue.” *Shaw v. Delta Airlines*, 463  
13 U.S. 85, 95 (1983). ““Pre-emption may be either express or implied, and ‘is compelled whether  
14 Congress’ command is explicitly stated in the statute’s language or implicitly contained in its  
15 structure and purpose.’” *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)); *see*  
16 *also Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992). Because Section 803 is an  
17 express preemption provision, the ““task of statutory construction must in the first instance focus  
18 on the plain wording of the clause, which necessarily contains the best evidence of Congress’  
19 pre-emptive intent.’” *Uhm v. Humana Inc.*, 540 F.3d 390, 983 (9th Cir. 2008) (quoting *CSX*  
20 *Transp. Inc. v. Easterwood*, 507 U.S. 568, 664 (1993)). The Court may then look to the “object  
21 and policy” of the provision. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 474 (9th Cir. 2007)  
22 (citations omitted). The intent of Congress is the “ultimate touchstone of every preemption

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23 <sup>5</sup> Rather than simply relying on Tenth Amendment jurisprudence, the States also appear  
24 to raise a more general structural federalism challenge to Section 803—for example by citing  
25 Eleventh Amendment cases. That argument fails as well. Cases such as *Gregory v. Ashcroft*,  
26 501 U.S. 452 (1991) and *Alden v. Maine*, 527 U.S. 706 (1999), stand for the proposition that,  
27 where Congress seeks to impose limits on state authority, either through preemption of state law  
28 or through the waiver of state sovereign immunity, Congress must follow the clear statement rule  
and make its intentions express. *See Biggs v. Wilson*, 1 F.3d 1537, 1543-44 (9th Cir. 1993)  
(finding no Tenth Amendment violation where Congress preempted state law by applying the  
FLSA to state employees). But there is no freestanding limitation on Congress’ authority where  
Congress speaks clearly to limit a states’ ability to regulate, as it has done with Section 803 to  
limit state power. Section 803 implicates no Tenth Amendment or state sovereignty concerns.

1 case.” *Id.*

2 The State Officials argue that, even if Section 803 is constitutional, their investigations  
3 may continue in some fashion under this provision. *See* State Opp. at 14-17. This contention not  
4 only ignores the plain language and intent of Section 803, it relies on cherry picking certain  
5 examples of information encompassed by the States’ investigations. There is no question that  
6 Section 803 expressly preempts investigations by state authorities of alleged assistance by  
7 electronic communications service providers to elements of the intelligence community, *see* 50  
8 U.S.C. § 1885b, and that it applies here. Section 803 was added specifically to “address[]” the  
9 instant investigations in “that a number of state regulatory commissions have or might begin to  
10 investigate cooperation by state regulated carriers with U.S. intelligence agencies.” SSCI Report  
11 at 24. In enacting what would become Section 803, the Senate Select Committee on Intelligence  
12 specifically referenced these cases, noting that the United States “filed suit seeking to enjoin state  
13 officials in five states from further investigation of electronic communication service providers  
14 for their alleged disclosure of customer telephone records to the National Security Agency,” and  
15 this Court’s July 2007 decision “that these state investigations were not preempted by either the  
16 Supremacy Clause or the foreign affairs power of the federal government.” *Id.* at 7-8. Moreover,  
17 making many of the arguments they reiterate here, the States at issue here provided testimony as  
18 to why Section 803 was inappropriate and unnecessary. *See* States’ Joint Statement to the Senate  
19 Judiciary Committee (attached hereto as Exh. B), *available at* [http://www.maine.gov/tools/  
20 whatsnew/index.php?topic=AGOffice\\_Cases &id=46975&v=article](http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice_Cases &id=46975&v=article) (last visited Apr. 8, 2009).

21 But Congress disagreed, noting in particular the “uncertain[ty]” of “further protracted  
22 proceedings” in these cases. *See* SSCI Report at 7-8. Congress concluded that the preemption of  
23 state authority was the only way to protect the United States’ alleged intelligence activities from  
24 state regulators. *See id.* at 12 (noting that “although states play an important role in regulating  
25 electronic communication service providers, they should not be involved in regulating the  
26 relationship between electronic communication service providers and the intelligence  
27 community” through their investigatory powers); *see also* 154 Cong. Rec. S6097-08, 6129  
28 (Statement of Sen. Rockefeller). Section 803 therefore “provides for the protection, by way of  
preemption, of the federal government’s ability to conduct intelligence activities without

1 interference by state investigations” and “preempts these state investigations by prohibiting  
2 them.” SSCI Report at 13; *see also* 154 Cong. Rec. S6097-08, 6135. Congress’ ultimate  
3 purpose is evident: To halt the inquiries now being undertaken by the State Officials.

4 To escape the express reach of Section 803, the State Officials fundamentally misstate the  
5 scope of the investigations at issue in this litigation. The record is clear that, in May 2006, after  
6 press reports concerning the carriers alleged provision of records to the NSA, the State Officials  
7 opened investigations or other inquiries against the carriers allegedly involved and sought to  
8 probe this very alleged activity. In some cases, the State Officials did this on their own initiative  
9 by issuing subpoenas or other discovery demands to the carrier defendants inquiring about the  
10 carriers’ alleged involvement with the Intelligence Community and expressly referencing the  
11 “NSA” by name. In other cases, citizens, interest groups, or other state investigators prompted  
12 state regulators with complaints that specifically referenced allegations that the carrier defendants  
13 assisted the NSA. But all of these inquiries concern allegations that carriers assisted the NSA in  
14 the alleged collection of communication records.

15 The fact that some particular items requested—such as privacy policies—may not, in  
16 themselves, reveal whether an alleged intelligence relationship existed is irrelevant. The purpose  
17 and focus of the inquiries was whether the carriers allegedly assisted the NSA in an alleged  
18 program for the collection of communication records. Section 803 precludes efforts by states to  
19 investigate or seek the disclosure of information related to alleged intelligence activities in order  
20 to “protect[] . . . the federal government’s ability to conduct intelligence activities without  
21 interference by state investigations,” SSCI Report at 13; that is precisely what the State Officials  
22 are undertaking. Each of the specific examples cited by the State Officials, *see* State Opp. at  
23 16-17, of inquiries that supposedly have “nothing to do” with alleged NSA activities are in fact  
24 part of an inquiry seeking to disclose that very information.

25 *Connecticut.* In May 2006, the ACLU filed a complaint based on media reports of the  
26 alleged NSA records program seeking an investigation into whether the carriers “disclosed  
27 customer information of their customers in Connecticut to the National Security Agency” and  
28 alleging violations of state law. *See* Exh. C, attached hereto (ACLU Compl. in Connecticut).

Connecticut Officials have themselves described these proceedings as an investigation into

1 whether the carriers “may have violated Connecticut law by providing customer proprietary  
2 network information (CPNI) to the National Security Agency (NSA) without warrants, court  
3 orders, subpoenas or subscriber permission.” *See* Exh. D at 1, attached hereto (Apr. 25, 2007  
4 Order Denying Motion to Dismiss). All of the cited requests relate to proving the truth of these  
5 allegations. Indeed, far from being unrelated to alleged NSA intelligence, Connecticut  
6 specifically demands the disclosure of policies related to disclosures of customer information  
7 “when not compelled to do so by subpoena, warrant, court order, or National Security letter,” *see*  
8 State Opp. at 16—the precise allegation in the ACLU Complaint concerning alleged NSA  
9 records collection from the carriers.

10 *Vermont.* Like Connecticut, the ACLU in Vermont made similar allegations after citing  
11 similar media reports and requested answers from carriers about whether those reports were true  
12 and whether carriers “did indeed disclose customer information to the NSA.” *See* Exh. E at 3,  
13 attached hereto (ACLU Compl. in Vermont). The Vermont information requests specifically  
14 seek information concerning whether the carriers “disclosed or delivered to the National Security  
15 Agency (“NSA”) the phone call records of any [] customers in Vermont” and numerous other  
16 questions concerning allegations that the carrier provided records “to the NSA.” *See* Exh. A, Tab  
17 2, to USG Mtn (Dkt. 536), Nos. 1, 2, 7, 8. These requests seek precise details concerning this  
18 allegation, including the “format,” “reporting intervals,” number of customers allegedly involved,  
19 number of occasions such disclosures were allegedly made, what information was contained in  
20 records allegedly disclosed, what communication service are allegedly at issue, what authority  
21 existed for the alleged disclosure, and what equipment was used to accomplish the alleged  
22 disclosure. *See id.* The Vermont Department of Public Service cited the lack of full responses to  
23 these information requests concerning the “alleged disclosure of customer information to the  
24 National Security Agency” as the basis for seeking to open an investigation. *See* Exh. F, attached  
25 hereto (Vermont DPS Petition to open investigation). The Vermont Officials have likewise  
26 acknowledged that their investigation “w[as] commenced to examine whether [the carrier] had  
27 violated Vermont utility standards by directly or indirectly providing customer record  
28 information to the National Security Agency (“NSA”) or other federal or state agencies (“NSA  
Customer Records Program”).” *See* Exh. G at 3, attached hereto (Sept. 18, 2006 Order of

1 Vermont Denying Motion to Dismiss). Thus, the Vermont Officials' assertion that certain  
2 requests make no "explicit reference" to the NSA and, thus, are "outside the scope" of Section  
3 803, *see* State Opp. at 16, is wrong, particularly as some of the requests they cite refer to "such  
4 disclosures" that, when read in context, could only refer to alleged "disclosures of . . .  
5 information to the NSA." *See* Exh. A, Tab 2, to USG Mtn (Dkt. 536), Nos. 8-12. The Vermont  
6 inquiry is unambiguously directed at alleged assistance by the carriers to the NSA.<sup>6</sup>

7 *Maine.* As with the other states, the Maine inquiry began when private parties brought  
8 complaints asking the Maine Officials to investigate "whether and to what extent [the carrier]  
9 cooperated" with the NSA and citing media reports of alleged NSA activities. *See* Exh. I,  
10 attached hereto (Excepts of Cowie Compl.). Maine Officials argue that their inquiry does not  
11 implicate Section 803 because they merely seek to confirm Verizon's public statements and thus  
12 do not seek disclosure at all and are not even conducting an investigation. But this  
13 characterization is disingenuous. The Maine Officials cannot dispute that their inquiry, on its  
14 face, puts at issue and seeks information concerning an alleged relationship between Verizon and  
15 the NSA related to alleged foreign intelligence activities. *See* Maine Order at 3. Moreover,  
16 Maine does not seek merely to confirm the truth of the press releases. Rather, its inquiry  
17 selectively removes statements from the press releases (at times misquoting or taking them out of  
18 context) and demands sworn testimony with respect to each individual topic—among others that  
19 Verizon confirm that: (i) it "was not asked by NSA to provide, nor did [it] provide, customer  
20 phone records from any of its businesses, or any call data from those records"; (ii) "[n]one of  
21 these companies . . . provided customer records or call data"; and (iii) it "did not provide to NSA  
22 customer records or call data, local or otherwise." *See* Maine Order, Exh. A, Tab 5 to USG Mtn  
23 (Dkt. 536). In short, working off of a public statement, Maine seeks to probe into the actual  
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25 <sup>6</sup> The Vermont Officials also fail to note that, in May 2006 Verizon answered the cited  
26 questions "exclud[ing] any information concerning its cooperation, if any, with the NSA and any  
27 similar intelligence gathering activities." *See* Exh. H at 4-8, attached hereto. Thus, if as  
28 Vermont contends that it is interested solely in matters outside the scope of Section 803, their  
inquiry would now be complete as to Verizon, but in fact has not been dropped. And the fact that  
these inquiries seek publicly available privacy policies provides no basis for them to probe into  
matters that Section 803 clearly forecloses.

1 facts on several specific topics. This demand for evidence under oath by a governing authority is  
2 plainly an investigation on a topic that is foreclosed by Section 803. There is an obvious  
3 difference between a private party voluntarily making a public statement without compulsion  
4 from state process, and being required to submit information under penalty of perjury and other  
5 sanction to state investigatory procedures. It is this investigation and compelled disclosure that  
6 Section 803 proscribes.

7 Moreover, through its process of seeking sworn affirmation of certain statements, Maine  
8 Officials seek to proscribe future conduct of the carrier. *See, e.g.*, Maine Order at 3 (demanding  
9 sworn affirmation, that in the future, the carrier “will provide customer information to a  
10 government agency only” under certain circumstances). By demanding that the carrier “affirm”  
11 under state law what it “will” and “will not” do in any dealings with the United States, the Maine  
12 Officials seek to bind it to a particular course of future conduct as a matter of state law and  
13 thereby to proscribe and limit the contours of the Federal Government's ability to work with that  
14 carrier. Thus, in addition to investigating and seeking disclosure information related to alleged  
15 assistance by the intelligence community, Maine Officials seek to “impose an administrative  
16 sanction” related to such allegations. *See* 50 U.S.C. § 1885b(a)(3).

17 *New Jersey's and Missouri's Subpoenas.* The New Jersey Officials make no effort at all  
18 to attempt to rehabilitate their inquiries. *See* State Opp. at 15-17. Twelve of the thirteen requests  
19 in the New Jersey subpoenas, issued May 17, 2006, shortly after the press reports referenced  
20 above, concern requests for information concerning the alleged “provision of Telephone Call  
21 History Data to the NSA.” *See* Exh. A, Tab 1 to USG Mtn (Dkt. 536). Missouri references only  
22 one of its subpoenas and ignores the subpoena expressly referencing the NSA and demanding  
23 production of information concerning whether “calling records have been delivered or otherwise  
24 disclosed to the National Security Agency” and “nature or type of information disclosed to the  
25 NSA.” Moreover, the carrier filed general objections seeking to exclude information concerning  
26 alleged NSA activities and any information confirming or denying the existence or non-existence  
27 of a relationship between the carrier and NSA. *See* Exh. J, attached hereto (carrier response to  
28 Missouri Officials). Missouri sought to compel disclosure of further information.

In sum, the State Officials' attempt to re-cast their investigations and articulate some state  
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1 interest or policy other than frustration of the federal objective is entirely baseless and does not  
2 evade preemption under Section 803. The clear target of the States' inquiries is the alleged  
3 provision of assistance to the NSA, which Section 803 preempts. The State Officials own brief  
4 describes Section 803 as precluding their "investigations into possible privacy violations by  
5 telecommunications companies" and "block[ing] states from even conducting factual inquiries  
6 *intended to uncover the truth regarding past events.*" State Opp. at 1, 8 (emphasis added).  
7 Finally, none of the State Officials state that they would limit their inquiries to matters that  
8 clearly do not implicate national security activities. Rather, they still seek to reserve regulatory  
9 authority that the States do not possess in light of the express preemption of Section 803.<sup>7</sup>

### 10 **III. SUMMARY JUDGMENT SHOULD BE GRANTED FOR THE UNITED STATES** 11 **IN THE *CLAYTON* ACTION AS WELL.**

12 The Missouri Officials in *Clayton*—the same officials who are defendants in the *Gaw*  
13 case brought by the United States—also argue that the United States cannot seek summary  
14 judgment in *Clayton* without first intervening, and that any intervention by the United States  
15 would be limited to constitutional issues. *See Clayton* Opp. at 2-6. Missouri's procedural  
16 arguments are insubstantial. Formal intervention by the Government should not be necessary at

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17 <sup>7</sup> Not only is express preemption under Section 803 applicable, but Section 803 also  
18 supports dismissal under the field and conflict preemption principles that United States  
19 previously advocated in these cases. First, Section 803 in particular, and the FISA Amendments  
20 Act of 2008 in general, is further evidence of Congress' intent to cover the field and thereby  
21 exclude state regulation in national security and intelligence matters, consistent with the statutes  
22 already cited by the United States, *see, e.g.*, USG Supp. Br. in State Cases at 8-9 & n.7 (Dkt.  
23 265). Section 803 thus provides further evidence that Congress has "so thoroughly occupie[d] a  
24 legislative field as to make reasonable the inference that Congress left no room for the states to  
25 supplement it." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (plurality). Second,  
26 Section 803 is an additional statute that prohibits the disclosure of information concerning alleged  
27 intelligence activities to state regulators such as the ones already cited by the United States, *see,*  
28 *e.g.*, USG Supp. Br. in State Cases at 10-12 (Dkt. 265). Under these circumstances, permitting  
continued disclosures to state regulators under these circumstances would surely "stand[] as an  
obstacle to the accomplishment and execution of the full purpose and objectives of Congress."  
*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Finally, our reliance on an express preemption  
theory, *see* USG Mtn at 3, n.5 (preserving our earlier preemption positions), does not preclude  
application of other bases of preemption. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861,  
869 (2000) (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), for the proposition that an  
express preemption provision does not foreclose other bases of implied preemption).

1 this stage in *Clayton*, particularly given that the carrier defendants have moved for summary  
2 judgment. The United States has separately sued the Missouri Officials and seeks judgment  
3 against them pursuant to Section 803 in the *Gaw* case. That judgment would preclude any action  
4 by the Missouri Officials to enforce the subpoena at issue in the *Clayton* action. Also, the  
5 preemption question is purely legal, and the United States is authorized to present its position and  
6 represent its interests in the *Clayton* action pursuant to 28 U.S.C. § 517 without formal  
7 intervention. In the event the Court deems intervention to be necessary to dispose of the *Clayton*  
8 action, it can and should treat the Government's motion as one for intervention, and the Missouri  
9 Officials present no grounds for opposing any such intervention. The United States would meet  
10 all of the requirements of intervention under either part of Rule 24 of the Federal Rules of Civil  
11 Procedure, should the Court request such a motion, because: (i) this case remains in its initial  
12 stages as the Court considers whether the state investigations are preempted; (ii) Congress  
13 provided that the United States may enforce Section 803; and (iii) there is no prejudice to the  
14 *Clayton* parties as they have opposed all the arguments of the United States in the *Gaw* action,  
15 where they are parties.<sup>8</sup> See *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817  
16 (9th Cir. 2001); *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) ("the  
17 requirements for intervention are broadly interpreted in favor of intervention").

### 18 CONCLUSION

19 For the foregoing reasons and those stated in our motion for summary judgment, the  
20 Court should enter judgment for the United States on the ground that Section 803 of the FISA, 50  
21 U.S.C. § 1885b, preempts the States' investigations at issue in the above-captioned actions.

22 Dated: April 9, 2009

Respectfully Submitted,

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25 JOSEPH H. HUNT  
26

27  
28 <sup>8</sup> Finally, the Missouri Officials' argument that our intervention would be limited to  
constitutional issues under 28 U.S.C. § 2403 is wrong and mistakes the basis for any  
intervention. Section 2403 only applies where that statute is the basis of intervention.

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