

1 ANN BRICK (State Bar No. 65296)
2 MARK SCHLOSBERG (State Bar No. 209144)
3 NICOLE A. OZER (State Bar No. 228643)
4 AMERICAN CIVIL LIBERTIES UNION
5 FOUNDATION OF NORTHERN CALIFORNIA
6 39 Drumm Street
7 San Francisco, CA 94111
8 Telephone: 415/621-2493
9 Facsimile: 415/255-8437
10 abrick@aclunc.org
11 mschlosberg@aclunc.org
12 nozer@aclunc.org

13 Attorneys for Plaintiffs

14 *Additional counsel listed on following page*

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 DENNIS P. RIORDAN; EDWARD
19 GERARD DE BONIS; ROBERT S.
20 GERSTEIN; ROD GORNEY; ROBERT
21 JACOBSON; VINCENT J. MANISCALCO;
22 CAROL SOBEL; AMERICAN CIVIL
23 LIBERTIES UNION OF NORTHERN
24 CALIFORNIA, a nonprofit corporation;
25 ACLU OF SOUTHERN CALIFORNIA, a
26 nonprofit corporation; AMERICAN CIVIL
27 LIBERTIES UNION OF SAN
28 DIEGO/IMPERIAL COUNTIES, a nonprofit
corporation,

Plaintiffs,

v.

VERIZON COMMUNICATIONS, INC, a
corporation; and DOES 1 through 20,

Defendants.

Case No. C-06-3574 VRW

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR REMAND;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: August 17, 2006
Time: 2:00 p.m.
Dept: 6, 17th Floor
Judge: The Honorable Vaughn R. Walker

1 PETER ELIASBERG (No. 189110)
CLARE PASTORE (No. 135933)
2 AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTHERN CALIFORNIA
3 1616 Beverly Boulevard
Los Angeles, CA 90026
4 Telephone: 213/977-9500
Facsimile: 213/250-3919
5 peliasberg@aclu-sc.org
cpastore@aclu-sc.org

6 DAVID BLAIR-LOY (No. 229235)
7 AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SAN DIEGO/IMPERIAL COUNTIES
8 P.O. Box 87131
San Diego, CA 92138
9 Telephone: 619/232-2121
Facsimile: 619/232-0036
10 dblairloy@clusandiego.org

11 LAURENCE F. PULGRAM (No. 115163)
JENNIFER L. KELLY (No. 193416)
12 SAINA SHAMILOV (No. 215636)
CANDACE MOREY (No. 233081)
13 FENWICK & WEST LLP
Embarcadero Center West
14 275 Battery Street
San Francisco, CA 94111
15 Telephone: 415/875-2300
Facsimile: 415/281-1350
16 lpulgram@fenwick.com
jkelly@fenwick.com
17 sshamilov@fenwick.com
cmorey@fenwick.com

18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page(s)
NOTICE OF MOTION AND MOTION FOR REMAND	1
ISSUES TO BE DECIDED	1
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION	2
INTRODUCTION AND SUMMARY	2
FACTUAL AND PROCEDURAL BACKGROUND.....	3
ARGUMENT	7
I. PLAINTIFFS’ CLAIMS DO NOT ARISE UNDER FEDERAL LAW	7
A. The Face of the Complaint Demonstrates That Plaintiffs’ Claims Arise Solely Under State Law	7
B. Neither of Plaintiffs’ Claims Is Completely Preempted by Federal Statute.....	9
1. Omnibus Crime Control and Safe Streets Act (Title III).....	11
2. FISA	11
3. ECPA and Stored Communications Act	13
C. Plaintiffs’ Claims Are Not Preempted By Federal Common Law.....	14
D. Plaintiffs’ Claim for Relief Does Not Depend on Resolution of a Substantial, Disputed Federal Issue That is “Embedded” in Their State Claims	16
E. The State Secrets Privilege Cannot Be Asserted by Defendant and in Any Event Does Not Provide a Basis to Remove.....	19
1. Only the federal government can assert the state secrets or <i>Totten</i> doctrines.....	20
2. The state secrets and <i>Totten</i> doctrines are not elements of Plaintiffs’ complaint that could give rise to federal jurisdiction	21
II. DEFENDANT MAY NOT REMOVE UNDER SECTION 1442(a) BECAUSE ITS ACTIONS WERE NOT DIRECTLY CONTROLLED BY A FEDERAL OFFICER OR AGENCY	23
CONCLUSION	25

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

American Civil Liberties Union of New Jersey, Inc. v. County of Hudson,
352 N.J. Super. 44, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002)..... 23

Ansley v. Ameriquest Mortgage Co.,
340 F.3d 858 (9th Cir. 2003)..... 2, 10

ARCO Env'tl. Remediation, L.L.C. v. Dept. of Health & Env't Quality of Montana,
213 F.3d 1108 (9th Cir. 2000)..... 8

Arness v. Boeing North American, Inc.,
997 F. Supp. 1268 (C.D. Cal. 1998)..... 24

Atherton v. FDIC,
519 U.S. 213 (1997)..... 15, 16

Baker v. BDO Seidman, LLP,
390 F. Supp. 2d 919 (N.D. Cal. 2005) 19

Balcorta v. Twentieth Century-Fox Film Corp.,
208 F.3d 1102 (9th Cir. 2000)..... 8, 9

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964)..... 15

Beneficial Nat'l Bank v. Anderson,
539 U.S. 1 (2003)..... 10

Boyle v. United States Techs. Corp.,
487 U.S. 500 (1988)..... 11, 15, 16

Bugarin v. Chartone, Inc.,
135 Cal. App. 4th 1558 (2006) 23

Camacho v. Autoridad De Telefonos De Puerto Rico,
868 F.2d 482 (1st Cir. 1989)..... 24

Campbell v. General Motors Corp.,
19 F. Supp. 2d 1260 (N.D. Ala. 1998)..... 12

Caterpillar, Inc. v. Williams,
486 U.S. 386 (1987)..... 2, 8

City of Livingston v. The Dow Chemical Co.,
No. C 05-03262, 2005 WL 2463916, 2005 U.S. Dist. LEXIS 42387, (N.D. Cal.
Oct. 5, 2005)..... 17

D.T.M. Research L.L.C. v. A.T.&T. Corp.,
245 F.3d 327 (4th Cir. 2001)..... 22

Ellsberg v. Mitchell,
709 F.2d 51 (D.C. Cir. 1983)..... 20, 22

Empire Healthchoice Assur., Inc., v. McVeigh,
396 F.3d 136 (2d Cir. 2005), *aff'd*, 126 S. Ct. 2121 (2006)..... 15

Empire Healthchoice Assurance, Inc. v. McVeigh,
126 S. Ct. 2121 (2006)..... passim

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

TABLE OF AUTHORITIES
(continued)

		Page(s)
1		
2		
3	<i>Metropolitan Life Ins. Co. v. Taylor</i> ,	
4	481 U.S. 58 (1987).....	9
5	<i>Muskovich v. Crowell</i> ,	
6	No. 3-95-CV-80007, 1995 WL 905403, 1995 U.S. Dist. LEXIS 5899 (S.D.	
7	Iowa Mar. 21, 1995).....	13
8	<i>N.Y. State Dep't of Soc. Servs. v. Dublino</i> ,	
9	413 U.S. 405 (1973).....	10
10	<i>Navarra v. Bache Halsey Stuart Shields Inc.</i> ,	
11	510 F. Supp. 831 (E.D. Mich. 1981).....	11
12	<i>O'Neill v. St. Jude Medical, Inc.</i> ,	
13	No. Civ. 04-1211 (JRT), 2004 WL1765335, at *2, 2004 U.S. Dist. LEXIS	
14	15203, at *7 (D. Minn. Aug. 5, 2004).....	15
15	<i>Overly v. Raybestos-Manhattan</i> ,	
16	No. C-96 285331, 1996 WL 532150, 1996 U.S. Dist. LEXIS 13535, (N.D. Cal.	
17	Sept. 9, 1996)	24, 25
18	<i>Paldrmic v. Altria Corp. Servs., Inc.</i> ,	
19	327 F. Supp. 2d 959 (E.D. Wis. 2004).....	24
20	<i>Patrickson v. Dole Food Co.</i> ,	
21	251 F.3d 795 (9 th Cir. 2001), <i>aff'd</i> , 588 U.S. 468 (2003)	9, 15
22	<i>People v. Conklin</i> ,	
23	12 Cal. 3d 259, (1974)	11
24	<i>Rubin v. City of Los Angeles</i> ,	
25	190 Cal. App. 3d 560 (1987).....	23
26	<i>Shamrock Oil & Gas Corp. v. Sheets</i> ,	
27	313 U.S. 100 (1941).....	7
28	<i>Shaw v. Delta Air Lines, Inc.</i> ,	
29	463 U.S. 85 (1983).....	12
30	<i>Tenet v. Doe</i> ,	
31	544 U.S. 1 (2005).....	11, 20, 21
32	<i>Torres v. Southern Peru Copper Corp.</i> ,	
33	113 F.3d 540 (5th Cir. 1997).....	15
34	<i>Totten v. United States</i> ,	
35	92 U.S. 105 (1875).....	20, 21, 23
36	<i>United States v. Am. Tel. & Tel. Co.</i> ,	
37	86 F.R.D. 603 (D.D.C. 1979).....	20
38	<i>United States v. Hall</i> ,	
39	543 F.2d 1229 (9th Cir. 1976).....	11
40	<i>United States v. Reynolds</i> ,	
41	345 U.S. 1 (1953).....	20, 21, 22
42	<i>Wallis v. Pan American Petroleum Corp.</i> ,	
43	384 U.S. 63 (1966).....	15, 16

TABLE OF AUTHORITIES
(continued)

		Page(s)
3	<i>Watson v. Phillip Morris Cos., Inc.</i> , 420 F.3d 852 (8th Cir. 2005).....	24
4	<i>Wayne v. DHL Worldwide Express</i> , 294 F.3d 1179 (9th Cir. 2002).....	10
6	<i>Weinberger v. Catholic Action of Hawaii/Peace Educ. Project</i> , 454 U.S. 139 (1981).....	21
7	<i>White v. Davis</i> , 13 Cal. 3d 757 (1975)	9
8	<i>Whittaker v. Garcetti</i> , 291 F. Supp. 2d 1132 (C.D. Cal. 2003)	11
9	<i>Winters v. Diamond Shamrock Chemical Co.</i> , 149 F.3d 387 (5th Cir. 1998).....	24
11	<i>Zschernig v. Miller</i> , 389 U.S. 429 (1968).....	15
12	<u>STATUTES</u>	
13	18 U.S.C. § 2510, <i>et seq.</i>	10
14	18 U.S.C. § 2511(2)(a)(ii).....	16
15	18 U.S.C. § 2520(d)	16
15	18 U.S.C. § 2703(d)	14
16	18 U.S.C. § 2708.....	13
17	18 U.S.C. § 2710(f).....	14
18	18 U.S.C. § 3127	12
18	18 U.S.C. §§ 2701-2712.....	13
19	27 U.S.C. § 2707(e)	16
20	28 U.S.C. § 1441	7
21	28 U.S.C. § 1442(a)	3, 23, 24
21	28 U.S.C. § 1442(a)(1).....	23
22	28 U.S.C. §§ 1441-1444.....	7
23	50 U.S.C. § 1801, <i>et seq.</i>	10
24	50 U.S.C. § 1841	12
24	50 U.S.C. § 1842.....	11, 12
25	50 U.S.C. § 1842(f).....	12
26	50 U.S.C. § 1843	12
27	50 U.S.C. § 1844.....	12
27	Cal. Const. art. I, § 1 (2006).....	9
28	Cal. Pub. Util. Code § 2891	4, 9, 18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

	Page(s)
Cal. Pub. Util. Code § 2891(d).....	18
Cal. Pub. Util. Code § 2894	16
Cal. Pub. Util. Code § 2894(a).....	18
<u>OTHER AUTHORITIES</u>	
14B Charles Alan Wright, et al., Federal Practice and Procedure § 3722.1 (3d ed. 2006)	10
Historical & Statutory Notes, § 1 of Stats. 1986, c. 821	4, 9
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968).....	11

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

2 **INTRODUCTION AND SUMMARY**

3 Plaintiffs filed this action in state court to enjoin Verizon’s voluntary turnover to the
4 government of their private telephone calling records. The Complaint asserts only two claims,
5 both under state law: for violation of privacy rights under (i) the California Constitution and (ii)
6 California Public Utilities Code § 2891. Verizon nonetheless removed this action, asserting
7 principally that various federal defenses and immunities, including doctrines related to national
8 security, may preclude Plaintiffs’ claims. That removal was without merit and contrary to law.

9 As a matter of black letter law, Verizon’s assertion of potential defenses or evidentiary
10 exclusions does not give rise to federal jurisdiction. Part I(A), *infra*. “It is now settled law that a
11 case may *not* be removed to federal court on the basis of a federal defense, including the defense
12 of preemption, even if the defense is anticipated in the plaintiff’s complaint, and even if both
13 parties concede that the federal defense is the only question truly at issue.” *Caterpillar, Inc. v.*
14 *Williams*, 486 U.S. 386, 393 (1987) (emphasis in original). This signal principle disposes of the
15 bulk of Verizon’s asserted grounds for removal.

16 First, Verizon’s purported defense that Plaintiffs’ claims are preempted by federal statutes
17 does not create federal jurisdiction. Any preemption defenses must be raised in state court,
18 excepting only “extraordinary” instances where Congress has clearly manifested its intention to
19 “preempt completely” state jurisdiction and convert state law claims into federal ones. *Ansley v.*
20 *Ameriquest Mortgage Co.*, 340 F.3d 858, 862 (9th Cir. 2003). No such intention is evident here.
21 To the contrary, the Congressional scheme reflects a conscious intent that state regulation co-exist
22 with federal privacy protections for telephone calling information. Part I(B), *infra*.

23 Similarly, there is no need to look to federal common law. Congress has already spoken
24 through particular statutes as to the appropriate interaction between federal and state law in the
25 regulation of disclosure of telephone records. Part I(C), *infra*.

26 Nor does the possible defense of legal compulsion or any other federal defense give rise to
27 jurisdiction under the “embedded federal issue” doctrine described in *Empire Healthchoice*
28 *Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2128-29, 2137 (2006) and *Grable & Sons Metal*

1 *Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2368, *reh'g denied*, 126 S. Ct. 25 (2005) .
2 That doctrine does not alter settled law that a federal defense cannot create subject matter
3 jurisdiction. Rather, it provides jurisdiction only if a state law claim necessarily has embedded
4 *within its affirmative elements* the *necessity* of determining an actual and disputed question of
5 federal law. No such element exists in the privacy claims Plaintiffs have raised. Part I(D), *infra*.

6 For the same reason, Verizon's assertion of an evidentiary privilege or bar to disclosure of
7 "state secrets" does not confer federal jurisdiction. Whether framed as a privilege or defense, the
8 state secrets doctrine confers no jurisdiction on the federal courts, and may be appropriately
9 decided by the state tribunal. Moreover, this doctrine cannot be asserted by a private party
10 defendant. Part I(E), *infra*. Indeed, in light of the broad public knowledge of Verizon's
11 disclosure of telephone call records, no state secret hangs in the balance in any event.

12 Finally, because Verizon has not established that it was acting under the compulsion or
13 control of any federal agency in voluntarily revealing Plaintiffs' call records, Verizon has not met
14 its burden to demonstrate jurisdiction under 28 U.S.C. § 1442(a). A mere request by a federal
15 agency for information is insufficient; Verizon bears the burden to show (and has not) that it
16 acted under government compulsion and control, or it cannot stay in federal court. Part II, *infra*.

17 These basic jurisdictional principles compel remand. While no one would dispute the
18 vital importance of national security as a federal objective, the invocation of that interest does not
19 suffice to manufacture jurisdiction in federal courts presented with claims founded solely on state
20 law. State courts are fully competent to adjudicate issues connected to federal law, be they
21 questions of evidentiary privilege or of federal preemption. The existence of potential federal
22 issues does not negate the bedrock rule that the federal courts' limited jurisdiction may not be
23 extended to federal issues outside the elements of a well-pleaded complaint.

24 **FACTUAL AND PROCEDURAL BACKGROUND**

25 On May 26, 2006, in the wake of widespread publicity about Verizon's voluntary turnover
26 of vast databases of private customer information to the federal government, Plaintiffs
27 commenced this action against Verizon in San Francisco Superior Court. Plaintiffs are Verizon
28 residential customers, including the drafter of the Customer Privacy Act, lawyers, a psychiatrist,

1 and the members of the three ACLU affiliates in California, who claim rights of privacy in the
2 information relating to their telephone communications. Complaint ¶ 3-4, 8.

3 The calling records turned over by Verizon cover the calls made by millions of Verizon's
4 residential customers. They include the telephone numbers of those making and receiving the
5 calls, as well as time, date, and duration of each call. Once that information is obtained, it is a
6 simple matter to match it with any one of a number of databases readily available to the
7 government, thus connecting a name and address to each telephone number. As a result, the
8 information provided by Verizon—information provided in violation of its own privacy policy—
9 reveals the identity of whomever Plaintiffs call and of whoever calls them. *Id.* ¶¶ 19, 21.

10 While every person has an obvious interest in the privacy of the records of their non-
11 public telephone communications, many of the Plaintiffs have a particular interest in knowing
12 that the identity of the persons with whom they communicate will remain free from the prying
13 eyes of the government and others. *Id.* ¶ 4. For psychiatrists, such as Plaintiff Rod Gorney, that
14 privacy is crucial. Many patients want the fact that they are consulting a psychiatrist to remain
15 confidential, but their consultation will not be confidential for long if the government can
16 determine whom these psychiatrists or patients call or who calls them. Similarly, criminal
17 attorneys such as Dennis Riordan and Carol Sobel use their home telephones to advise clients
18 who at times prefer that it not be known that they are seeking advice. The assurance that no one,
19 most especially the government, will have routine access to their calling records is essential. *Id.*

20 Thus, the specter of the wholesale disclosure of Plaintiffs' calling records is a most serious
21 matter. Indeed, the California Legislature recognized the importance of maintaining the
22 confidentiality of just this sort of information when it enacted the Customer Privacy Act, which
23 includes Cal. Pub. Util. Code § 2891. The Legislature declared that "the protection of this right to
24 privacy [of telephone communications] is of paramount state concern, and to this end, has enacted
25 this act." Cal. Pub. Util. Code § 2891, Historical & Statutory Notes, § 1 of Stats. 1986, c. 821.

26 The fact of Verizon's conduct has been widely publicized and, at this point, is anything
27 but secret. On May 11, 2006, USA Today reported that the National Security Agency (NSA) was
28 collecting records of all calls made by customers of Verizon and other cooperating companies,

1 compiled into “the largest database ever assembled in the world,” with a goal of creating “a
2 database of every call ever made” within the United States. *See* Lesley Cauley, *NSA Has Massive*
3 *Database of Americans’ Phone Calls*, USA Today, May 11, 2006 (RFJN Exh. A at 1). The
4 calling records were requested by and provided to the NSA without warrant, FISA Court order, or
5 an Attorney General’s letter of authorization. *Id.* at 2 (relying on “a U.S. intelligence official
6 familiar with the program”).¹

7 Many subsequent reports have expanded on these facts. The *New York Times* reported
8 that a “senior government official” had “confirmed that the N.S.A. had access to records of most
9 telephone calls in the United States . . . [but] said the call records were used for the limited
10 purpose of tracing regular contacts of ‘known bad guys.’” Eric Lichtblau & Scott Shane, *Bush is*
11 *Pressed Over New Reports on Surveillance*, N.Y. Times, May 12, 2006 (raising questions
12 whether or not records of local calls and cellular calls were stored or delivered to government
13 along with long distance records) (RFJN Exh. B at 1). The *New Yorker* quoted a security
14 consultant with a major telecommunications carrier who reported that “[w]hat the companies are
15 doing is worse than turning over records . . . they’re providing total access to all the data.”
16 Seymour M. Hersh, *Listening In*, The New Yorker (May 29, 2006 issue (RFJN Exh. C at 1).

17 Knowledgeable public officials have repeatedly reinforced these reports on the record,
18 confirming the nature of the information Verizon delivered to the government.

- 19 • “[T]hree [lawmakers] and another lawmaker said MCI, the long-distance carrier that
20 Verizon acquired in January [2006] did provide call records to the government.”
21 Susan Page, *Lawmakers: NSA Database Incomplete*, USA Today, June 30, 2006
(RFJN Exh. I at 2)
- 22 • Senator Christopher “Kit” Bond (R-MO), who also has received access to information
23 on warrantless surveillance operations, explained on PBS that “[t]he president’s
24 program uses information collected from phone companies . . . what telephone number
25 called what other telephone number.” PBS Online NewsHour, *NSA Wire Tapping*
Program Revealed, May 11, 2006, (RFJN Exh. F at 5).
- 26 • Senator Pat Roberts (R-KS), the chair of Senate Intelligence Committee, described the
27 program on NPR. When asked about whether he had been briefed that the NSA had

28 ¹ Verizon has denied that it turned over records to the NSA, but has not denied that MCI did so. Verizon purchased MCI in January 2006. Susan Page, *Lawmakers: NSA Database Incomplete*, USA Today, June 30, 2006 (RFJN Exh. I at 2). Plaintiff Dennis Riordan’s long distance carrier is MCI. Comp.¶ 9. Plaintiffs refer to Verizon and MCI collectively as “Verizon.”

1 collected millions of phone records for domestic calls, Roberts stated: “Well,
2 basically, if you want to get into that, we’re talking about business records. We’re not,
3 you know, we’re not listening to anybody. This isn’t a situation where if I call you,
4 you call me, or if I call home or whatever, that that conversation is being listened to.”
Senate Intelligence Chair Readies For Hayden Hearings, NPR All Things Considered,
5 May 17, 2006 (RFJN Exh. D at 2).

- 6 • Senate Majority Leader William Frist (R-TN), when asked whether he was
7 comfortable with the program described in the USA Today article stated “Absolutely.
8 I am one of the people who are briefed . . . I’ve known about the program. I am
9 absolutely convinced that you, your family, our families are safer because of this
10 particular program.” CNN Late Edition with Wolf Blitzer, May 14, 2006 (RFJN
11 Exh. E at 12).

12 It is also no secret that at least one other telephone company, Qwest Communications,
13 refused to provide the government with requested information, precisely because no legal
14 compulsion or authority was ever provided by the government. *Lawyer: Ex-Qwest Exec Ignored*
15 *NSA Request*, USA Today, May 12, 2006 (RFJN Exh. G at 2). As explained in a published
16 statement by the lawyer for Qwest’s former CEO:

17 “Mr. Nacchio made inquiry as to whether a warrant or other legal
18 process had been secured in support of [the NSA’s request for
19 access to the private telephone records of Qwest customers]. When
20 he learned that no such authority had been granted and that there
21 was a disinclination on the part of the authorities to use any legal
22 process, including the Special Court which had been established to
23 handle such matters, Mr. Nacchio concluded that these requests
24 violated the privacy requirements of the Telecommunications Act.”

25 *See Full Statement From Attorney Of Former Qwest CEO Nacchio*, The Wall Street Journal
26 Online, May 12, 2006 (RFJN Exh. H).

27 Plaintiffs’ Complaint seeks only declaratory and injunctive relief under two causes of
28 action arising out of Verizon’s disclosures of their calling records—(i) violation of Plaintiffs’
rights of privacy guaranteed under Article I, section 1 of the California Constitution, and (ii)
violation of Section 2891 of the California Public Utilities Code (the “Customer Privacy Act”),
which precludes disclosure of personal calling information. Complaint ¶¶ 36-37, 46-47. Though
Plaintiffs might have done so, they chose not to pursue any rights to relief under federal law. Nor
have they asserted any claims against any agency, office or component of the federal government
or its representatives. Plaintiffs do not dispute that providing information in response to legal

1 process would—had it been provided that way—supply Verizon a defense. Rather, Plaintiffs
2 simply seek to require that Verizon not cede to the government their personal calling information
3 without their consent and compliance with California law.

4 On June 5, 2006, Verizon removed, relying on 28 U.S.C. Sections 1441 and 1442. For the
5 reasons described below, that removal was improper.

6 **ARGUMENT**

7 There is a strong presumption against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d
8 564, 566 (9th Cir. 1992); *Kozelek v. Jetset Records*, No. C-05-4822 VRW, 2006 WL 1530161,
9 at *1, 2006 U.S. Dist. LEXIS 39654, at *3 (N.D. Cal. June 5, 2006) (Walker, J.); *Armitage v.*
10 *Deutsche Bank AG*, No. C 05-3998 PJH, 2005 WL 3095909, at *1, 2006 U.S. Dist. LEXIS
11 30997, at *5-6 (N.D. Cal. Nov. 14, 2005 (Hamilton, J.)). The removal statute, 28 U.S.C. § 1441,
12 is strictly construed, with all doubts about the propriety of federal jurisdiction resolved against
13 removal. *Gaus*, 980 F.2d at 566; *see also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100,
14 108 (1941). The party seeking removal bears the burden of proving that the federal district court
15 has subject matter jurisdiction. *Gaus*, 980 F.2d at 566; *Emrich v. Touche Ross & Co.*, 846 F.2d
16 1190, 1195 (9th Cir. 1988). To meet its burden, the party seeking removal must justify its
17 jurisdictional allegations by a preponderance of the evidence. *Gaus*, 980 F.2d at 567.

18 Where, as here, there is no diversity jurisdiction, the party seeking removal thus carries
19 the burden of establishing that the plaintiffs' claims originally could have been commenced in
20 federal court on federal question grounds, or that one of a very limited number of special federal
21 statutes authorizes removal. *See* 28 U.S.C. §§ 1441-1444. Verizon can show neither.

22 **I. PLAINTIFFS' CLAIMS DO NOT ARISE UNDER FEDERAL LAW.**

23 **A. The Face of the Complaint Demonstrates That Plaintiffs' Claims Arise Solely** 24 **Under State Law.**

25 This action presents straightforward claims for invasion of privacy, based on Verizon's
26 disclosure of Plaintiffs' confidential residential telephone records without their consent in
27 violation of (i) Article I, Section 1 of the California Constitution and (ii) the California Customer
28 Privacy Act, Section 2891 of the California Public Utilities Code.

1 The purely state-law nature of the claims stated in the Complaint should end the analysis.
2 It is settled law that the presence or absence of federal question jurisdiction is governed by the
3 “well-pleaded complaint” rule. *Caterpillar*, 482 U.S. at 392. As “master” of the complaint, a
4 plaintiff may intentionally and properly choose *not* to invoke federal jurisdiction and to avoid
5 removal to federal court by deciding—as Plaintiffs did here—not to assert federal claims. *Id.*;
6 *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th Cir. 2000).

7 Under the well-pleaded complaint rule, federal question jurisdiction arises *only* where the
8 complaint establishes, on its face, either that federal law creates the cause of action or that the
9 plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.
10 *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983). A court
11 cannot exercise removal jurisdiction on the ground that the complaint gives rise to a potential or
12 an anticipated defense that might raise a federal question, even if the defense is the only question
13 truly at issue in the case. *Id.* at 10, 14. “[I]t is now settled law that a case may *not* be removed to
14 federal court on the basis of a federal defense, including the defense of pre-emption, even if the
15 defense is anticipated in the plaintiff’s complaint, and even if both parties concede that the federal
16 defense is the only question truly at issue.” *Caterpillar*, 482 U.S. at 393 (emphasis in original);
17 *see also ARCO Env’tl. Remediation, L.L.C. v. Dept. of Health & Env’t Quality of Montana*, 213
18 F.3d 1108, 1113 (9th Cir. 2000) (“Put simply, the existence of federal jurisdiction depends solely
19 on the plaintiff’s claims for relief and not on anticipated defenses to those claims.”). As Justice
20 Cardozo explained, a federal issue “lurking in the background . . . is unavailing to extinguish the
21 jurisdiction of the states.” *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 117 (1936); *see*
22 *also Empire*, 126 S. Ct. at 2137 (emphasizing that the mere need to apply federal law in a state
23 law claim does not suffice to open the “arising under” door).

24 Here, as “master” of their Complaint, Plaintiffs exercised their right to seek relief for
25 Verizon’s conduct solely under California law, which provides robust protection for the privacy
26 of Californians. Indeed, the California Legislature could not have been plainer when it stated in
27 the preamble to the Customer Privacy Act: “The Legislature hereby finds and declares that
28 residential telephone and telegraph customers and subscribers have a right to private

1 communications, that the protection of this right to privacy is of paramount state concern, and to
2 this end, has enacted this act.” Cal. Pub. Util. Code § 2891, Historical & Statutory Notes, § 1 of
3 Stats. 1986, c. 821 (2004). Likewise, the people of California could not have spoken more clearly
4 when, in 1972, they added the right of privacy as an inalienable state right under Article 1,
5 Section 1 of their constitution. Cal. Const. art. I, § 1 (2006); *see White v. Davis*, 13 Cal. 3d 757,
6 774 (1975) (“the moving force behind the new constitutional provision was a more focused
7 privacy concern, relating to the accelerating encroachment on personal freedom and security
8 caused by increased surveillance and data collection activity in contemporary society”).

9 While Plaintiffs might have asserted alternative theories of liability for Verizon’s conduct
10 under federal law, their choice to rely exclusively on state law claims, as expressed on the face of
11 their well-pleaded complaint, requires remand.

12 **B. Neither of Plaintiffs’ Claims Is Completely Preempted by Federal Statute.**

13 Ordinarily, federal preemption is merely a defense to a state law claim; it does *not* confer
14 removal jurisdiction, regardless of its merit as a potential or actual bar to liability. *Metropolitan*
15 *Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *Balcorta*, 208 F.3d at 1107 n.7. This is in
16 accord with the well-pleaded complaint rule, which forbids consideration of potential defenses for
17 purposes of determining whether a complaint presents a federal question. State courts are fully
18 competent to apply preemption principles, and such a defense is properly adjudicated in the state
19 forum. *See Patrickson v. Dole Food Co.*, 251 F.3d 795, 802 (9th Cir. 2001), *aff’d*, 588 U.S. 468
20 (2003) (observing that state courts can and do apply federal law in a wide variety of
21 circumstances, and that this “does not undermine the nationwide uniformity of federal law much
22 more than having somewhat different applications of federal law in the various federal circuits”).

23 A limited exception to this rule, known as the “complete preemption” doctrine, provides
24 that in certain cases Congress may so completely preempt a particular area of the law that any
25 state law cause of action in that area is displaced, leaving room for only a federal claim.
26 *Metropolitan Life*, 481 U.S. at 63-64. In effect, what is pleaded as a state law claim is reclassified
27 as a federal claim, and as such, is removable. *Franchise Tax Bd.*, 463 U.S. at 23-24.

28 Complete preemption is exceedingly rare. There is a presumption against it, which can be

1 overcome only by a clear congressional manifestation of intent to occupy an entire regulatory
 2 field and transmogrify state law claims into federal question claims. *See N.Y. State Dep’t of Soc.*
 3 *Servs. v. Dublino*, 413 U.S. 405, 413 (1973); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 132
 4 (1978); *see also, Empire*, 126 S. Ct. at 2135; *Ethridge v. Harbor House Restaurant*, 861 F.2d
 5 1389, 1403 (9th Cir. 1988). Simply put, “the test [for complete preemption] is whether Congress
 6 clearly manifested an intent to convert state law claims into federal-question claims.” *Ansley*, 340
 7 F.3d at 862 (quoting *Wayne v. DHL Worldwide Express*, 294 F.3d 1179 (9th Cir. 2002))
 8 (requiring evidence of Congressional intent, and labeling such instances “extraordinary”).² As
 9 Justice Scalia explained the complete preemption rule in dissent in *Beneficial Nat’l Bank*, “[d]ue
 10 regard for the rightful independence of state governments, which should actuate federal courts,
 11 requires that they scrupulously confine their own jurisdiction to the precise limits which the
 12 [removal] statute has defined.” 539 U.S. at 16, 18 (2003) (quoting *Healy v. Ratta*, 292 U.S. 263,
 13 270 (1934)); *see also* 14B Charles Alan Wright, et al., *Federal Practice and Procedure* § 3722.1
 14 (3d ed. 2006) (“Because of the obvious federalism implications of the complete-preemption
 15 doctrine, its application has been extremely limited by the courts.”).

16 Verizon nonetheless alleges in its removal papers—without discussion or support—that
 17 three federal statutes “completely preempt” Plaintiffs’ privacy-based state law claims: the
 18 Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*; Title III of the
 19 Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”), and the Electronic
 20 Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* (“ECPA”). Notice of Removal ¶ 7. *None*
 21 *of these statutes completely preempts Plaintiffs’ claims. Indeed, not one of them (or their*
 22 *respective legislative histories) bears any expression of congressional intent to preempt the entire*
 23 *field of electronic communications and call records, much less the “clear” expression required for*
 24

25 ² Consequently, federal courts have only rarely found legislation to preempt state law
 26 completely. The Supreme Court has found complete preemption only as to Section 301 of the
 27 Labor Management Relations Act, Section 502(a) of ERISA, and sections of the National Bank
 28 Act. *See Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1 (2003); *Ansley*, 340 F.3d at 862. While
 lower courts have found complete preemption of state law by other federal statutes in certain
 limited cases, as discussed in the text, none of these cases includes any of the federal statutes
 cited by Verizon in its removal papers.

1 a finding of complete preemption. Nor has any state or federal court (with the exception of one
2 district court discussed below) ever held that FISA, Title III, or ECPA completely preempts
3 corresponding state law claims.

4 **1. Omnibus Crime Control and Safe Streets Act (Title III).**

5 Courts consistently have recognized that Title III does not even “ordinarily” preempt state
6 privacy laws regulating conduct falling within its scope. “It is well accepted that Congress’
7 wiretapping statute was not an attempt to occupy the field, but merely an attempt to establish
8 minimum standards.” *Whittaker v. Garcetti*, 291 F. Supp. 2d 1132, 1142 (C.D. Cal. 2003);
9 *Navarra v. Bache Halsey Stuart Shields Inc.*, 510 F. Supp. 831, 833 (E.D. Mich. 1981) (and cases
10 cited therein); *People v. Conklin*, 12 Cal. 3d 259, 271-273 (1974) (Sullivan, J., unanimous) (the
11 “legislative history of title III reveals that Congress intended that the states be allowed to enact
12 more restrictive laws designed to protect the right of privacy” and the statute shows “no intent by
13 Congress to occupy the entire field involving the interception of communications”); *see also*
14 *United States v. Hall*, 543 F.2d 1229, 1231 (9th Cir. 1976) (*dictum*).³ The legislative history of
15 the wiretap act fully supports this conclusion as well. *See* S. Rep. No. 1097, 90th Cong., 2d Sess.
16 (1968), reprinted in 1968 U.S.C.C.A.N. 2187 (noting that the scope of the civil remedies provided
17 for wiretapping offenses is “intended to be both comprehensive and exclusive, but there is no
18 intent to preempt parallel state law”).

19 **2. FISA.**

20 It is not clear why Verizon contends that FISA preempts Plaintiffs’ claims here, but the
21 short answer to that contention is that it does not. No court has ever found that FISA completely
22 preempts state law privacy claims. Nor can it be said to do so. FISA governs the use of pen
23 registers and trap and trace devices used for the limited purpose of acquiring foreign intelligence

24 ³ Verizon’s reliance on *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1 (2003) in support of
25 its contention that FISA, Title III, and ECPA completely preempt Plaintiffs’ claims is misplaced.
26 *See* Notice of Removal ¶ 7. *Beneficial*, involved ordinary (not complete) preemption, and thus is
27 inapposite on the removal issue. Moreover, *Beneficial* involved state law usury claims against
28 national banks, an arena that the Supreme Court recognized as long having been held to be
completely preempted by the National Bank Act. 539 U.S. at 10 (recognizing the Court’s
“longstanding and consistent construction of the National Bank Act as providing an exclusive
federal cause of action” for such claims).

1 information. 50 U.S.C. § 1842. Pen registers and trap and trace devices gather information
2 electronically about the identity of persons making and receiving calls as well as other
3 characteristics of the call, but not its substantive content.⁴

4 With two limited exceptions, neither of which is applicable here, the installation of a pen
5 register or trap and trace device requires an order from the FISA court. *Id.*⁵ Section 1842(f)
6 directly addresses the liability of telecommunications companies that provide information *in*
7 *response to* an order issued by the FISA court:

8 No cause of action shall lie in any court against any provider of a wire or
9 electronic communication service, landlord, custodian, or other person (including
10 any officer, employee, agent, or other specified person thereof) that furnishes any
11 information, facilities, or technical assistance under subsection (d) of this section
12 *in accordance with the terms of an order issued under this section.*

13 50 U.S.C. § 1842(f) (emphasis added). What subsection (f) makes abundantly clear is that
14 Congress contemplated, *and did not prohibit*, liability where telephone companies install,
15 or aid the government in installing, pen register or trap and trace devices in the absence of
16 a FISA order.

17 It is not at all clear that FISA has any application to Verizon’s voluntary disclosure of the
18 calling records of millions of its residential customers. In that case it could not preempt
19 Plaintiffs’ state law claims. Simply put, a statute cannot preempt what it does not cover. *See,*
20 *e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.17 (1983); *Campbell v. General Motors*
21 *Corp.*, 19 F. Supp. 2d 1260, 1272-73 (N.D. Ala. 1998). To the extent FISA does have some
22 relevance, it shows a clear Congressional intention to permit suits where calling information is

23 ⁴ A pen register is a device that captures information about a telephone call, other than its
24 contents, from the instrument originating the call. A trap and trace device captures similar
25 information about the telephone receiving the call. 50 U.S.C. § 1841 (incorporating by reference
26 the definitions of 18 U.S.C. § 3127).

27 ⁵ Section 1843 authorizes the Attorney General to authorize the installation of these devices in an
28 emergency situation, *provided* that the Attorney General notifies the FISA court at that time and
makes an application for an order under section 1842 within 48 hours. 50 U.S.C. § 1843. Section
1844 allows the President, through the Attorney General, to authorize the installation of such a
device “for a period not to exceed 15 calendar days following a declaration of war by Congress.”
50 U.S.C. § 1844.

1 provided without the issuance of a FISA order. As discussed in Part I.D, *infra*, this is entirely
2 consistent with Section 2894 of the Public Utilities Code, which provides an affirmative defense
3 for disclosure of phone records made pursuant to any legal compulsion. Plaintiffs’ claims are
4 thus in conformity—not in conflict—with FISA. As such, even ordinary preemption does not
5 apply, let alone the “complete preemption” needed to support subject matter jurisdiction here.

6 3. ECPA and Stored Communications Act.

7 Nor does the ECPA or the Stored Communications Act (“SCA”) completely preempt
8 Plaintiffs’ state law claims.⁶ Section 2708 of the SCA provides: “The remedies and sanctions
9 described in this chapter are the only judicial remedies and sanctions for nonconstitutional
10 violations *of this chapter*.” 18 U.S.C. § 2708 (emphasis added). Thus, while Section 2708 may
11 limit the remedies available *for a violation of the SCA* to those provided in the statute, the
12 language by its terms imposes that limitation only on the remedies available for violations of
13 chapter 121 (*i.e.*, for violations of the Stored Communications Act), not for violations of state or
14 other federal laws. The statute leaves untouched the availability of remedies for violations of
15 state law.⁷ “If Congress intends a preemption instruction completely to displace ordinarily
16 applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that
17 atypical intention clear.” *Empire*, 126 S. Ct. at 2125.

18 Other sections of the SCA also demonstrate that Congress did not intend to preempt all
19 state law claims in the field of stored communications. Rather, the statute carefully and expressly
20 imposes limitations on the applicability of state laws in select instances, while recognizing the
21 continued parallel application of state law as a default. For example, Section 2710 of the SCA,
22 pertaining to the disclosure of video tape rental and sale records, includes this provision: “The

23 ⁶ Though Verizon fails to point to any particular portions of ECPA, Plaintiffs assume that
24 the portion of ECPA it is relying on is the Stored Communications Act, chapter 121 of Title 18,
25 U.S. Code, 18 U.S.C. §§ 2701-2712 (the “SCA”). The SCA is a part of ECPA passed by
Congress in 1986, which specifies requirements and causes of action relating to disclosure of
electronically stored communications and records.

26 ⁷ Although the court in *Muskovich v. Crowell*, No. 3-95-CV-80007, 1995 WL 905403, 1995
27 U.S. Dist. LEXIS 5899 (S.D. Iowa Mar. 21, 1995) read the SCA differently, the court, without
28 explanation, simply ignored the critical last three words of Section 2708. Nor did it consider the
other provisions of the SCA, discussed in the text, *infra*, that further demonstrate a Congressional
intent to displace state law only in certain, limited instances and not generally.

1 provisions of this section preempt only the provisions of State or local law that require disclosure
2 prohibited by this section.” 18 U.S.C. § 2710(f). If Congress had intended for the SCA to oust
3 all state laws, it would have been unnecessary for it to provide a specific preemption clause in
4 Section 2710. In fact, this language reflects Congress’ intent that states be permitted to have their
5 own parallel, concurrent, and *more restrictive* privacy laws relating to stored communications,
6 while preempting only laws that authorized *more disclosure* than allowed by Section 2710.

7 Similarly Section 2703(d) addresses the circumstances under which governments may, via
8 court order, obtain access to the contents of stored communications under a relaxed “relevance”
9 standard. It expressly provides that “[i]n the case of a State governmental authority, such a court
10 order shall not issue *if prohibited by the law of such State.*” 18 U.S.C. § 2703(d) (emphasis
11 added). Thus, Congress envisioned that states might very well have their own coexisting and
12 more restrictive privacy laws limiting issuance of court orders to state officials. Had Congress
13 instead intended to “preempt completely” all state privacy law claims relating to the disclosure of
14 stored communications, there obviously would have been no need for it to delimit specific
15 preemptions or application of state law as it did in these sections of the SCA.

16 **C. Plaintiffs’ Claims Are Not Preempted By Federal Common Law.**

17 Verizon’s assertion that Plaintiffs’ claims are completely preempted by various principles
18 of federal common law is equally faulty. *See* Notice of Removal ¶ 7. It is not enough for
19 Verizon simply to assert that Plaintiffs’ claims implicate foreign relations, foreign intelligence,
20 national security, or any other matter that might seem capable of adjudication in federal court. It
21 must either demonstrate that an existing federal common law completely preempts Plaintiffs’
22 claims, or that the stringent conditions are met for fashioning a new federal common law to
23 displace Plaintiffs’ claims. Verizon can do neither here.

24 As an initial matter, Verizon has not identified an existing substantive rule of federal
25 common law that could apply in this case. While it is true that courts have held that a federal
26 common law of foreign relations exists, Verizon cannot seriously contend that this action
27 involves international diplomacy. As recognized by the relatively few cases that have invoked it,
28 foreign relations preemption comes into play, if at all, only when prosecution of a state law claim

1 (or enforcement of a state law) could impact directly the United States’ relations with a particular
 2 foreign nation. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964);
 3 *Zschernig v. Miller*, 389 U.S. 429, 440-441 (1968); *Torres v. Southern Peru Copper Corp.*, 113
 4 F.3d 540, 543 (5th Cir. 1997).⁸ While Verizon’s decision to hand over Plaintiffs’ records to the
 5 NSA may have been motivated by an interest in national security, there is no basis for concluding
 6 that Plaintiffs’ prosecution of their privacy-based claims against Verizon—a private, domestic
 7 company—will have any impact on the United States’ relations with any foreign nation.⁹

8 Nor can Verizon demonstrate that the federal government’s interest in national security or
 9 intelligence gathering warrants creation of a new federal common law. Absent congressional
 10 authorization, courts may only create new federal common law if the operation of state law
 11 governing the dispute would (1) “significant[ly] conflict” with (2) “uniquely federal interests.”
 12 *See Boyle*, 487 U.S. at 504; *Empire Healthchoice Assur., Inc., v. McVeigh*, 396 F.3d 136 (2d Cir.
 13 2005), *aff’d*, 126 S. Ct. 2121 (2006). Cases justifying judicial creation of preemptive federal
 14 rules are extremely limited: “[w]hether latent federal power should be exercised to displace state
 15 law is primarily a decision for Congress,’ not the federal courts.” *Atherton v. FDIC*, 519 U.S.
 16 213, 218 (1997) (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).
 17 Such judicial rule-making is not at all appropriate in this case for two simple reasons.

18 First, although the federal government certainly has a strong interest in matters of national
 19 security, the narrower federal interest at stake here is in the gathering of intelligence through
 20 information about telephone calls. As Verizon itself asserts, however, this is an area already
 21 addressed by Congress through FISA, portions of Title III and the Stored Communications Act.
 22 It would therefore be inappropriate to supplant the detailed work of Congress with a set of federal

23 ⁸ Indeed, the Ninth Circuit has interpreted foreign affairs preemption narrowly, emphasizing that
 24 federal question jurisdiction does not exist in all cases in which foreign relations might arise as an
 25 issue. *Patrickson*, 251 F.3d at 803. *See also O’Neill v. St. Jude Medical, Inc.*, No. Civ. 04-1211
 26 (JRT), 2004 WL1765335, 2004 U.S. Dist. LEXIS 15203, (D. Minn. Aug. 5, 2004) (comparing
 cases, noting that under *Patrickson*, the Ninth Circuit maintains the “strictest interpretation” of
 the well-pleaded complaint rule and finds federal jurisdiction only where “the four corners of the
 complaint included claims actually involving foreign affairs”).

27 ⁹ To the extent Verizon asserts that the state secrets privilege is a principle of federal common law
 28 that confers federal jurisdiction (*see* Notice of Removal ¶¶ 7, 9) this privilege may not be
 asserted by Verizon, and, in any event, would not provide a basis to remove. *See* Part I(E), *infra*.

1 common law rules. *See Atherton*, 519 U.S. at 218; *Boyle*, 483 U.S. at 504 (creating common law
2 appropriate only in the absence of “explicit statutory directive” on the subject).

3 Second, there is no conflict, much less a “significant” conflict, between Plaintiffs’
4 California privacy claims and any uniquely federal interest. Displacing state law requires that a
5 “significant conflict between some federal policy or interest and the use of state law ... must first
6 be specifically shown.” *Atherton*, 519 U.S. at 218 (quoting *Wallis*, 384 U.S. at 68). A
7 “significant conflict” occurs when the application of state law runs counter to a federal policy or
8 would frustrate specific objectives of federal legislation. *See Boyle*, 487 U.S. at 507, 509 (duty of
9 care under state tort law was “precisely contrary” to duty imposed by government contract).

10 Verizon cannot show the requisite “significant conflict” here because none exists. A
11 conflict would arise only if the California laws on which Plaintiffs’ claims are based made
12 unlawful some act of Verizon that federal law or policy deemed lawful. That is not the case here.
13 As discussed in Part I.D, *infra*, Verizon may present as an affirmative defense any assertion that it
14 acted pursuant to legal process, including a legal federal process. *See Cal. Pub. Util. Code*
15 § 2894. The federal statutes Verizon cites as potentially “authorizing” its conduct likewise
16 provide a defense for disclosures made pursuant to legal process. *See Notice of Removal* ¶ 10
17 (citing 18 U.S.C. § 2511(2)(a)(ii); 27 U.S.C. § 2707(e); 18 U.S.C. § 2520(d)). California law and
18 federal law are not in conflict (much less significant conflict), as legal process provides a defense
19 under either. This fact is fatal to Verizon’s claim of federal common law preemption; “unless and
20 until that showing is made, there is no cause to displace state law, much less to lodge this case in
21 federal court.” *See Empire*, 126 S. Ct. at 2124.

22 **D. Plaintiffs’ Claim for Relief Does Not Depend on Resolution of a Substantial,**
23 **Disputed Federal Issue That is “Embedded” in Their State Claims.**

24 Verizon also errs in contending that Plaintiffs’ right to relief falls into that “slim category”
25 of cases that may be removed because they necessarily require resolution of a substantial question
26 of federal law that is disputed between the parties and embedded in Plaintiffs’ state law claim.
27 *See Empire*, 126 S. Ct. at 2137; *Grable*, 125 S. Ct. at 2368; *Notice of Removal* ¶ 8. To the extent
28 that issues of federal law are relevant, they are relevant only as defenses to Plaintiffs’ claims or

1 evidentiary privileges. They are not elements of Plaintiffs’ well-pleaded complaint.

2 A state law claim will be treated as “arising under” federal law for purposes of removal
 3 jurisdiction only if there is a “dispositive and contested federal issue at the heart of” the state law
 4 claim. *Grable*, 125 S. Ct. at 2371. As the *Grable* Court explained: “the question is, does a state-
 5 law claim necessarily raise a stated federal issue, actually disputed and substantial, which a
 6 federal forum may entertain without disturbing any congressionally approved balance of federal
 7 and state judicial responsibilities.” *Id.* at 2368. However, as the Court emphasized this term,
 8 removal based on an embedded federal issue applies to only a “special and small” category of
 9 cases. *Empire*, 126 S. Ct. at 2136, 2137 (referring to the “slim category [that] *Grable*
 10 exemplifies.”). Plaintiffs’ claims do not fall within this narrow category of cases.

11 First, *Grable* is not an exception to the well-pleaded complaint rule governing the
 12 removability of actions. *See Empire*, 126 S. Ct. at 2131; *In re Circular Thermostat Antitrust*
 13 *Litig.*, No. MDL C05-01673 WHA, 2005 WL 2043022, at *5 (N.D. Cal. Aug. 24, 2005) (“The
 14 proper inquiry, then, is whether ‘some substantial, disputed question of federal law is a necessary
 15 element of one of the well-pleaded state claims.’” (quoting *Merrell Dow Pharms., Inc. v.*
 16 *Thompson*, 478 U.S. 804, 813 (1986)). Where federal issues arise only as a matter of defense,
 17 removal under the embedded federal question doctrine is improper. *See In re Circular*
 18 *Thermostat*, 2005 WL 2043022, at *4 (noting that “it would greatly simplify matters if the
 19 [federal] issues [in that case] could be characterized as anticipated defenses”); *City of Livingston*
 20 *v. The Dow Chemical Co.*, No. C 05-03262, 2005 WL 2463916, at *3, 2005 U.S. Dist. LEXIS
 21 42387, at *9 (N.D. Cal. Oct. 5, 2005)tg (distinguishing *Grable* and remanding: state law claims
 22 for labeling violations based on failure to warn did not *necessarily* raise federal issue, because
 23 “FIFRA only becomes an issue in this case if Defendants raise preemption as a defense”).

24 Here, the existence of legal compulsion (federal, state, or otherwise) for Verizon’s
 25 disclosure of customers’ calling records is an affirmative defense that may or may not be
 26 available for Verizon to assert at the appropriate time. It is not a “necessary” element of either of
 27 Plaintiffs’ claims within the meaning of *Grable*. A claim for invasion of privacy under Article I,
 28 section 1 of the California Constitution requires only proof of: (1) a legally protected privacy

1 interest; (2) a reasonable expectation of privacy; and (3) serious invasion of that privacy interest.
2 *Loder v. City of Glendale*, 14 Cal. 4th 846, 893-94 (1997); *Hill v. Nat’l Collegiate Athletic Ass’n*,
3 7 Cal. 4th 1, 39-40 (1994). The defendant’s asserted justification for its actions are defenses to
4 the plaintiff’s claim. *Hill*, 7 Cal. 4th at 40 (defendant may prevail by “pleading and proving, as
5 an affirmative defense, that the invasion of privacy is justified because it substantially furthers
6 one or more countervailing interests.”).

7 Likewise, a claim under the Customer Privacy Act requires only proof that the defendant
8 “made available” the plaintiff’s personal calling information to a third party without first
9 obtaining the plaintiff’s permission in writing. Cal. Pub. Util. Code § 2891. There is no federal
10 law element. Lest there be any doubt, Section 2894(a) expressly provides that legal compulsion
11 is an affirmative defense. *See* Cal. Pub. Util. Code § 2894(a) (disclosure “in good faith
12 compliance with the terms of a state or federal court warrant or order or administrative subpoena
13 issued at the request of a law enforcement official or other federal, state, or local governmental
14 agency for law enforcement purposes, *is a complete defense* against any civil action brought
15 under this chapter or any other law”) (emphasis added).¹⁰ Any issue as to whether Verizon’s
16 disclosure to the NSA may have been “federally” authorized thus will arise at most in the context
17 of a defense that, at this point, *has not even been raised*, and, based on the public statements of
18 Qwest’s CEO, does not appear to be available. The same holds true for any purported
19 “immunities” from liability that may be available to Verizon. *See* Notice of Removal ¶ 10.

20 Second, the issue of federal authorization for Verizon’s conduct does not raise a
21 substantial dispute over the interpretation of federal law, as required by *Grable*. A federal
22 question is substantial only if it “necessarily turn[s] on some *construction* of federal law.”
23 *Franchise Tax Bd.*, 463 U.S. at 9 (emphasis added); *see also Grable*, 125 S. Ct. at 2368.
24 Removal is not proper where the dispute is primarily factual in nature. In *Grable*, for example,
25 plaintiff’s claim to quiet title hinged on his asserted interpretation of the notice provisions of a
26

27 ¹⁰ Public Utilities Code Section 2891(d)(6) also provides that “[i]nformation provided to a
28 law enforcement agency in response to lawful process” does not constitute a violation, reinforcing
that a defense is available in such instances. Cal. Pub. Util. Code § 2891 (d).

1 federal statute. “Whether Grable was given notice within the meaning of the federal statute is
2 thus an essential element of its quiet title claim, and the meaning of the federal statute . . . appears
3 to be the only legal or factual issue contested in the case.” *Id.* By contrast, in *Empire*, the heart
4 of plaintiff’s case turned not on the meaning of a federal statute, but rather on a disputed set of
5 facts. Thus, *Empire* involved a “fact-bound and situation-specific” inquiry that was unlikely to
6 be controlling in other cases, even though the suit arose because of plaintiff’s obligations under
7 the terms of its contract with the government.

8 The issue potentially to be raised here—whether Verizon turned over its customers’
9 records in response to legal process is the same sort of “fact-bound and situation-specific” inquiry
10 presented in *Empire*. It is not the “nearly pure issue of law” such as that presented in *Grable*, the
11 resolution of which “was both dispositive of the case and would be controlling in numerous other
12 cases.” *Empire*, 126 S. Ct. at 2137. *Cf. Armitage*, 2005 WL 3095905, at *4, 2005 U.S. Dist
13 LEXIS 30997, at *12 (“plaintiffs’ claims can succeed on the mere theory that defendants
14 [knowingly] failed to advise them of the IRS notices . . . this does not in turn involve questions of
15 federal law interpretation”); *Baker v. BDO Seidman, LLP*, 390 F. Supp. 2d 919, 922 (N.D. Cal.
16 2005) (Chen, M.J.) (plaintiffs’ claim that defendants failed to disclose certain IRS notices and
17 warnings did not require interpretation of federal law).

18 It is not clear, of course, that any federal issue relating to federal compulsion or otherwise
19 will ever arise in this case. To the contrary, Plaintiffs have alleged that there was no compulsion,
20 only voluntary disclosure by a private corporation of consumer information. But even if the
21 question of compulsion arises, it would not present a question of *interpretation* of federal law.
22 Thus, any purported “federal” issue in this case, in addition to arising merely as a defense, is not
23 substantial within the meaning of *Grable*. *See Empire*, 126 S. Ct. at 2136-37. In sum, “[t]his
24 case cannot be squeezed into the slim category *Grable* exemplifies.” *Id.* at 2137.

25 **E. The State Secrets Privilege Cannot Be Asserted by Defendant and in Any**
26 **Event Does Not Provide a Basis to Remove.**

27 Verizon also asserts that removal is proper because “one of the first questions to be
28 answered in this litigation will be a question of federal law: whether the state-secrets privilege

1 applies” and because “no claims seeking to prove the existence of a secret espionage relationship
2 with the federal government may be adjudicated in the courts of the United States.” Notice of
3 Removal ¶¶ 7,9. Verizon cites *Tenet v. Doe*, 544 U.S. 1 (2005), which in turn explained the
4 “*Totten*” doctrine first enunciated in *Totten v. United States*, 92 U.S. 105 (1875). These
5 arguments fail for two independent reasons. First, they can be asserted only by the federal
6 government, which is not a party to this action. Second, an assertion of the state secrets privilege
7 or the *Totten* doctrine would not render those issues elements of Plaintiffs’ state law causes of
8 actions, and thus cannot support removal under the well-pleaded complaint rule, any more than
9 would assertion of any other federal immunity or defense.

10 **1. Only the federal government can assert the state secrets or *Totten***
11 **doctrines.**

12 It is beyond dispute that only the United States government can assert the state secrets
13 privilege. The state secrets privilege “belongs to the Government and must be asserted by it; it
14 can neither be claimed nor waived by a private party.” *United States v. Reynolds*, 345 U.S. 1, 7
15 (1953). See also *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998) (same); *Ellsberg v.*
16 *Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983) (same); *Halkin v. Helms*, 690 F.2d 977, 991 (D.C.Cir.
17 1982) (same). Indeed, the Supreme Court has warned that the privilege is “not to be lightly
18 invoked” (*Reynolds*, 345 U.S. at 7), and has dictated the procedural requirements the government
19 must meet to assert it: “[t]here must be a formal claim of privilege, lodged by the head of the
20 department which has control over the matter, after actual personal consideration by that officer.”
21 *Id.* at 7-8; accord *Halkin*, 690 F.2d at 991.¹¹

22 Likewise, no court has ever dismissed a case under *Totten* in which the United States, or
23 one of its agencies or employees was not a party, and in which the government had not requested

24 ¹¹ The purpose of these procedural requirements is “to assure that the privilege, which in any
25 event is waivable, is not lightly claimed. Hence, the requirement is that the claim be made by
26 someone in a position of sufficient authority and responsibility to weigh prudently the competing
27 considerations of making evidence available in litigation and protecting important governmental
28 interests . . . [T]he decision is a matter of importance and not merely routine categorization of
documents, and therefore should be made by a policy-maker who can be assumed to have the
larger public interest in mind.” *United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603, 605 (D.D.C.
1979)(H. Greene, J.).

1 the dismissal. This is consistent with the fact that the interests sought to be protected by *Totten*
2 and its progeny are the government’s interests in state secrets: “disclosure of the [secret
3 espionage] service might compromise or embarrass our government in its public duties.” *Totten*,
4 92 U.S. at 106. In *Totten*, the Supreme Court rejected an action brought against the United States
5 by an alleged Union spy who sought compensation for breach of an oral contract with President
6 Lincoln to pay him for espionage. *Id.*, at 107. Similarly, in *Tenet*, the Court held that *Totten*
7 barred a suit by plaintiffs against the CIA for allegedly renegeing on its obligations to pay for
8 espionage activities performed under contract with the United States. 544 U.S. at 3. Thus, *Totten*
9 stands for the proposition that certain suits against the government, primarily those in which
10 recovery is sought under confidential agreements for espionage, must be dismissed at its behest to
11 prevent disclosure of secret information.

12 Like the state secrets privilege, the *Totten* doctrine is designed to protect the interests of
13 the government, not those of a private litigant. *See Totten*, 92 U.S. at 107; *see also Weinberger v.*
14 *Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 146-47 (1981) (dismissing suit on
15 ground that it would require that Navy confirm or deny that it intended to store nuclear weapons
16 at a certain location). Since *Totten* protects government secrets, it is up to the government, not a
17 private party, to decide whether to assert to the Court that *Totten* mandates dismissal, as is the
18 case with the state secrets privilege. *See Reynolds*, 345 U.S. at 7.

19 The government is not present in this action to assert either the state secrets or *Totten*
20 principles, much less has it done so through a formal claim by a qualified official. It would be
21 entirely inappropriate to hold that federal subject matter jurisdiction exists on the ground of
22 doctrines that have not been, and cannot be, properly asserted by any party to this action.

23 **2. The state secrets and *Totten* doctrines are not elements of Plaintiffs’**
24 **complaint that could give rise to federal jurisdiction.**

25 Even if properly raised, however, neither the state secrets privilege nor the *Totten* doctrine
26 would provide a basis for federal jurisdiction. These issues are not “embedded” elements that
27 Plaintiffs must prove; rather, they are evidentiary rules or bars that will at most be federal issues
28 “collateral” to the elements of Plaintiffs’ claims. *See Gully*, 299 U.S. at 117-18. Thus, the well-

1 pleaded complaint rule precludes reliance upon them to confer jurisdiction. They must, like other
2 collateral federal issues, be considered and decided by the state courts before which state claims
3 are filed.

4 The state secrets doctrine is “a common law evidentiary privilege that allows the
5 government to *deny discovery* of military secrets.” *Kasza*, 133 F.3d at 1165 (emphasis added).
6 Even when the privilege is properly invoked, it does not generally require dismissal of an action.
7 Instead, “the result is simply that the [secret] evidence is unavailable, as though a witness had
8 died, and the case will proceed accordingly, with no consequences save those resulting from the
9 loss of the evidence.” *Ellsberg*, 709 F.2d at 64-65 (citation omitted); *see also In re United States*,
10 872 F.2d 472, 477 (D.C. Cir. 1989) (reversing dismissal prior to determination of relevancy and
11 secrecy of information; “[d]ismissal of a suit [as a result of a claim of state secrets privilege], and
12 the consequent denial of a forum without giving the plaintiff her day in court, however, is indeed
13 draconian”).

14 Moreover, the privilege “may not be used to shield any material not strictly necessary to
15 prevent injury to national security; and, whenever possible, sensitive information must be
16 disentangled from nonsensitive information to allow for the release of the latter.” *Ellsberg*,
17 709 F.2d at 57; *see also Kasza*, 133 F.3d at 1166.¹² This is because “[j]udicial control over the
18 evidence in a case cannot be abdicated to the caprice of executive officers.” *Reynolds*, 345 U.S.
19 at 9-10; *see also In re United States*, 872 F.2d at 475 (“[A] court must not merely unthinkingly
20 ratify the executive’s assertion of absolute privilege, lest it inappropriately abandon its important
21 judicial role.”).

22 The potential need for a court to consider and apply this privilege provides no basis for
23 federal jurisdiction. Indeed, given that the potential existence of a complete federal defense

24 _____
25 ¹² While proper assertion the state secrets privilege has occasionally led courts to dismiss an
26 action in its entirety, *see, e.g., Kasza*, 133 F.3d at 1166, it is more common for the privilege to
27 lead to a protective order or limitation on the evidence to be introduced, in accordance with the
28 “uniquely American concerns for democracy, openness, and separation of powers.” *In re Grand
Jury Subpoena Dated August 9, 2000*, 218 F. Supp. 2d 544, 560 (S.D.N.Y. 2002). *See, e.g.,
D.T.M. Research L.L.C. v. A.T.&T. Corp.*, 245 F.3d 327, 334 (4th Cir. 2001) (rejecting
“categorical rule mandating dismissal whenever the state secrets privilege is validly invoked” as
“unfair”); *Ellsberg*, 709 F.2d at 65.

1 provides no grounds for federal jurisdiction (*see* Parts I(B), (D), *supra*), *a fortiori*, the possibility
 2 that a court may have to address an evidentiary privilege does not create federal jurisdiction nor
 3 deprive a state of its sovereign ability to decide cases brought before its courts. State courts are
 4 entirely competent to apply federal regimes precluding disclosure of information. They do so
 5 every day, including, for example, federal constitutional privileges against self-incrimination, or
 6 federal statutory limitations on disclosure of health information. *Bugarin v. Chartone, Inc.*, 135
 7 Cal. App. 4th 1558 (2006) (interpreting and applying disclosure provisions of HIPPA and
 8 corresponding regulations). The California Court of Appeal has previously analyzed the state
 9 secrets privilege. *Rubin v. City of Los Angeles*, 190 Cal. App. 3d 560 (1987); *cf. American Civil*
 10 *Liberties Union of New Jersey, Inc., v. County of Hudson*, 352 N.J. Super. 44, 799 A.2d 629, 650
 11 (N.J. Super. Ct. App. Div. 2002) (United States intervened precisely to assert that national
 12 security interests authorized the challenged INS regulations regarding detainees, a claim
 13 eventually upheld by the state court). Defendants offer no authority for the proposition that the
 14 state secrets privilege provides a basis for federal jurisdiction, and Plaintiffs have found none.

15 Like a federal defense to a state law cause of action, the possible applicability of *Totten*
 16 doctrine also does not confer federal jurisdiction. That is true because assertion of the *Totten* bar
 17 would not constitute a federal law question that *plaintiffs must prove* as part of their state law
 18 causes of action. Whether framed as a privilege, a procedural bar, or as a defense, the *Totten*
 19 doctrine, like the state secrets doctrine, is not an element of Plaintiffs’ claims, does not give rise
 20 to federal jurisdiction under the well-pleaded complaint rule, and would, if raised, be
 21 appropriately adjudicated by the state court.

22 **II. DEFENDANT MAY NOT REMOVE UNDER SECTION 1442(a) BECAUSE ITS**
 23 **ACTIONS WERE NOT DIRECTLY CONTROLLED BY A FEDERAL OFFICER**
 24 **OR AGENCY.**

25 Verizon also seeks to remove pursuant to 28 U.S.C. § 1442(a)(1), claiming that “to the
 26 extent [it] engaged in the conduct alleged, it did so ‘acting under’ the direction of agencies or
 27 officers of the United States, or persons acting under such agencies or officers, under color of
 28 office.” Notice of Removal ¶ 11. Verizon’s removal notice, however, is fatally defective; it fails
 to allege that Verizon was acting pursuant to the government’s orders or compulsion—the *sine*

1 *qua non* of Section 1442(a) removal.

2 In order to meet Section 1442(a)'s "acting under" a federal officer standard, the defendant
3 must prove more than that it was acting under the general auspices of a federal officer. *Paldrmic*
4 *v. Altria Corp. Servs., Inc.*, 327 F. Supp. 2d 959, 966 (E.D. Wis. 2004); *Arness v. Boeing North*
5 *American, Inc.*, 997 F. Supp. 1268, 1273 (C.D. Cal. 1998); *Overly v. Raybestos-Manhattan*,
6 No. C-96 285331, 1996 WL 532150, at *3; 1996 U.S. Dist. LEXIS 13535, at *7 (N.D. Cal. Sept.
7 9, 1996) (Illston, J.); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) (Jensen, J.). It
8 must establish that it was acting pursuant to government compulsion and that the government's
9 "direction and control of their activities directly interfered with their ability to fulfill their state
10 law obligation." *Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1155
11 (D. Colo. 2002); see *Camacho v. Autoridad De Telefonos De Puerto Rico*, 868 F.2d 482 (1st Cir.
12 1989). When the defendant acts voluntarily, it may not invoke Section 1442. *Paldrmic.*, 327
13 F. Supp. 2d at 967; compare *Watson v. Phillip Morris Cos., Inc.*, 420 F.3d 852, 859 (8th Cir.
14 2005) (reaching a different conclusion on the underlying question of *whether* the requisite level of
15 compulsion was present under the *Paldrmic* facts, but still focusing on the absence or presence of
16 compulsion as determinative factor); see also *Winters v. Diamond Shamrock Chemical Co.*, 149
17 F.3d 387, 399-400, 401 n.16 (5th Cir. 1998) (focusing both on government's detailed
18 specifications concerning the composition of Agent Orange and fact that defendant was
19 compelled to provide the product to the government's specifications).

20 Verizon's reliance on *Camacho* is misplaced. See 868 F.2d 482. In *Camacho*, the
21 defendant telephone companies were sued for their role in aiding federal agents in conducting a
22 wiretap, *as required by a federal court order* issued under Title III. *Id.* at 489. In their removal
23 petition the defendants alleged that "at all times referred to in said complaint, co-defendants . . .
24 were acting under express orders, control and directions of federal officers who were acting under
25 color of their office as federal agents and in the performance of their official duties." *Id.* at 486.
26 It was this uncontradicted assertion of compulsion that permitted Section 1442 removal.

27 Here, in contrast, the Complaint alleges precisely the opposite. Plaintiffs specifically
28 allege that Verizon voluntarily turned over customer calling records to the NSA. Complaint ¶¶

1 18, 33. They further allege that Qwest refused the government's request to turn over its
2 customers' records due to lack of authorization from the government, thus buttressing the point
3 that Verizon's actions were voluntary not compelled. Complaint ¶ 31; RFJN Exh. H. Verizon's
4 removal notice, on the other hand, lacks even the most rudimentary allegations needed to
5 establish that its actions were the result of government compulsion. It alleges only that "to the
6 extent Verizon engaged in the conduct alleged, it did so 'acting under' the direction of agencies or
7 officers of the United States, or persons acting under such agencies or officers, under color of
8 office." Notice of Removal ¶ 11.

9 It is Verizon that bears the burden of proving that its actions were compelled by
10 government orders. *Arness*, 997 F. Supp. at 1271; *Overly*, 1996 WL 532150, at *2, 1996 U.S.
11 Dist. Lexis 13535, at *5; *Fung*, 816 F. Supp. at 571. In determining whether Verizon has met its
12 burden, the Court should construe the record in the light most favorable to remand while
13 resolving all deficiencies in the record against Verizon. *Freiberg*, 245 F. Supp. 2d at 1156;
14 *Arness*, 997 F. Supp. at 1271; *Overly*, *supra*, *2. Verizon has most surely failed to sustain its
15 burden here.

16 CONCLUSION

17 For the foregoing reasons, Plaintiffs' motion to remand should be granted.

18 Dated: July 5, 2006

FENWICK & WEST LLP

19 By: /s/ Laurence F. Pulgram

Laurence F. Pulgram

20 *Attorneys for Plaintiffs*

21 AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
Ann Brick, Mark Schlosberg, Nicole A. Ozer

22 AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTHERN CALIFORNIA
Peter Eliasberg, Clare Pastore

23 AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SAN DIEGO/IMPERIAL
COUNTIES

24 David Blair-Loy

25 FENWICK & WEST LLP

26 Laurence F. Pulgram, Jennifer L. Kelly,
27 Saina Shamilov, Candace Morey