

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

Attorneys for Plaintiffs

Additional counsel listed on following page

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TOM CAMPBELL; GEORGE MAIN;
DENNIS P. RIORDAN; MARGARET
RUSSELL; ROBERT SCHEER; PETER
SUSSMAN; RICHARD BELZER; MARC
COOPER; STEPHEN J. MATHER;
SANDRA RICHARDS; CURREN WARF;
AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA, a nonprofit
corporation; ACLU OF SOUTHERN
CALIFORNIA, a nonprofit corporation;
AMERICAN CIVIL LIBERTIES UNION
OF SAN DIEGO/IMPERIAL COUNTIES, a
nonprofit corporation,

Plaintiffs,

v.

AT&T COMMUNICATIONS OF
CALIFORNIA, a corporation; AT&T
CORP., a corporation; AT&T, Inc., a
corporation; and DOES 1 through 20,

Defendants.

Case No. C-06-3596 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)
2 CLARE PASTORE (No. 135933)
3 AMERICAN CIVIL LIBERTIES UNION
4 FOUNDATION OF SOUTHERN CALIFORNIA
5 1616 Beverly Boulevard
6 Los Angeles, CA 90026
7 Telephone: 213/977-9500
8 Facsimile: 213/250-3919
9 peliasberg@aclu-sc.org
10 cpastore@aclu-sc.org

11 DAVID BLAIR-LOY (No. 229235)
12 AMERICAN CIVIL LIBERTIES UNION
13 FOUNDATION OF SAN DIEGO/IMPERIAL COUNTIES
14 P.O. Box 87131
15 San Diego, CA 92138
16 Telephone: 619/232-2121
17 Facsimile: 619/232-0036
18 dblairloy@aclusandiego.org

19 LAURENCE F. PULGRAM (No. 115163)
20 JENNIFER L. KELLY (No. 193416)
21 SAINA SHAMILOV (No. 215636)
22 CANDACE MOREY (No. 233081)
23 FENWICK & WEST LLP
24 Embarcadero Center West
25 275 Battery Street
26 San Francisco, CA 94111
27 Telephone: 415/875-2300
28 Facsimile: 415/281-1350
lpulgram@fenwick.com
jkelly@fenwick.com
sshamilov@fenwick.com
cmorey@fenwick.com

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NOTICE OF MOTION AND MOTION FOR REMAND

TO DEFENDANTS AT&T COMMUNICATIONS OF CALIFORNIA, AT&T CORP.,
AND AT&T, INC. ("AT&T") AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs in the above-entitled action will and hereby do
move the United States District Court for the Northern District of California, in the courtroom of
the Honorable Vaughn R. Walker, on August 17, 2006, at 2:00 p.m., for an order remanding this
action to state court pursuant to 28 U.S.C. § 1447. Plaintiffs' motion is based upon the
Memorandum of Points and Authorities and supporting Request For Judicial Notice ("RFJN")
filed herewith, and upon such other matters as may be presented at the time of the hearing.

Plaintiffs seek prompt remand of this matter on the ground that the claims set forth in their
Complaint arise solely under state law, and there is no proper basis for removal of their claims to
federal court.

ISSUES TO BE DECIDED

1. Whether the "well pleaded complaint" rule requires remand for lack of subject
matter jurisdiction over Plaintiffs' state law claims for violation of the California state
Constitution's right of privacy and its Public Utilities Code, where

(a) Congress has not clearly manifested its intention to preempt completely
such state law claims through federal legislation;

(b) No federal common law has been heretofore created, nor need be created,
to avoid a significant conflict between Plaintiffs' claims and federal policies;

(c) The affirmative elements of Plaintiffs' claims do not require decision of a
substantial embedded question of the interpretation of federal law; and

(d) The evidentiary privilege for "state secrets" does not affirmatively create
federal jurisdiction, nor does a private party have standing to raise the privilege.

2. Whether remand is required where AT&T has not demonstrated that its voluntary
disclosure of plaintiffs' private telephone call records was directly controlled by a federal officer
or agency, as required under 28 U.S.C. § 1442(a)(1).

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**INTRODUCTION AND SUMMARY**

Plaintiffs filed this action in state court to enjoin AT&T's voluntary turnover to the government of their private telephone calling records. The Complaint asserts only two claims, both under state law: for violation of privacy rights under (i) the California Constitution and (ii) California Public Utilities Code § 2891. AT&T nonetheless removed this action, asserting principally that various federal defenses and immunities, including doctrines related to national security, may preclude Plaintiffs' claims. That removal was without merit and contrary to law.

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

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

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

Nor does the possible defense of legal compulsion or any other federal defense give rise to jurisdiction under the "embedded federal issue" doctrine described in *Empire Healthchoice 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, AT&T'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 AT&T's disclosure
11 of telephone call records, no state secret hangs in the balance in any event.

12 Finally, because AT&T has not established that it was acting under the compulsion or
13 control of any federal agency in voluntarily revealing Plaintiffs' call records, AT&T 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; AT&T bears the burden to show (and has not) that it acted
16 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 AT&T's voluntary turnover
26 of vast databases of private customer information to the federal government, Plaintiffs
27 commenced this action against AT&T in San Francisco Superior Court. Plaintiffs are AT&T
28 residential customers, including a former member of congress, journalists, a doctor, ministers,

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

3 The calling records turned over by AT&T cover the calls made by millions of AT&T'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 AT&T—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 reporters such as Plaintiffs Robert Scheer, Peter
14 Sussman and Marc Cooper, that privacy is crucial. Confidential sources will not be confidential
15 for long if the government can determine whom these reporters call or who calls them. Similarly,
16 criminal defense attorneys such as Dennis Riordan use their home telephones to advise clients
17 who at times prefer that it not be known that they are seeking advice. The assurance that no one,
18 most especially the government, will have routine access to their calling records is essential. *Id.*

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

25 The fact of AT&T's conduct has been widely publicized and, at this point, is anything but
26 secret. On May 11, 2006, USA Today reported that the National Security Agency (NSA) was
27 collecting records of all calls made by customers of AT&T and other cooperating companies,
28 compiled into "the largest database ever assembled in the world," with a goal of creating "a

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

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

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

- 19 • “Nineteen lawmakers who had been briefed on the program verified that the NSA has
20 built a database that includes records of Americans’ domestic phone calls. The
21 program collected records of the numbers dialed and the length of calls, sources said
22 Five members of the intelligence committees said they were told by senior
23 intelligence officials that AT&T participated in the NSA domestic call program.”
24 Susan Page, *Lawmakers: NSA Database Incomplete*, USA Today, June 30, 2006
25 (RFJN Exh. I at 1)
- 26 • Senator Christopher “Kit” Bond (R-MO), who also has received access to information
27 on warrantless surveillance operations, explained on PBS that “[t]he president’s
28 program uses information collected from phone companies . . . what telephone number
called what other telephone number.” PBS Online NewsHour, *NSA Wire Tapping*
Program Revealed, May 11, 2006, (RFJN Exh. F at 5).
- Senator Pat Roberts (R-KS), the chair of Senate Intelligence Committee, described the
program on NPR. When asked about whether he had been briefed that the NSA had
collected millions of phone records for domestic calls, Roberts stated: “Well,
basically, if you want to get into that, we’re talking about business records. We’re not,
you know, we’re not listening to anybody. This isn’t a situation where if I call you,

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, May 17, 2006 (RFJN Exh. D at 2).

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

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

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

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

Plaintiffs’ Complaint seeks only declaratory and injunctive relief under two causes of action arising out of AT&T’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 process would—had it been provided that way—supply AT&T a defense. Rather, Plaintiffs simply seek to require that AT&T not cede to the government their personal calling information

without their consent and compliance with California law.

On June 6, 2006, AT&T removed, relying on 28 U.S.C. Sections 1441 and 1442. For the reasons described below, that removal was improper.

ARGUMENT

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

Where, as here, there is no diversity jurisdiction, the party seeking removal thus carries the burden of establishing that the plaintiffs' claims originally could have been commenced in federal court on federal question grounds, or that one of a very limited number of special federal statutes authorizes removal. *See* 28 U.S.C. §§ 1441-1444. AT&T can show neither.

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

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

This action presents straightforward claims for invasion of privacy, based on AT&T's disclosure of Plaintiffs' confidential residential telephone records without their consent in violation of (i) Article I, Section 1 of the California Constitution and (ii) the California Customer Privacy Act, Section 2891 of the California Public Utilities Code.

The purely state-law nature of the claims stated in the Complaint should end the analysis. It is settled law that the presence or absence of federal question jurisdiction is governed by the

1 “well-pleaded complaint” rule. *Caterpillar*, 482 U.S. at 392. As “master” of the complaint, a
2 plaintiff may intentionally and properly choose *not* to invoke federal jurisdiction and to avoid
3 removal to federal court by deciding—as Plaintiffs did here—not to assert federal claims. *Id.*;
4 *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th Cir. 2000).

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

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

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

8 While Plaintiffs might have asserted alternative theories of liability for AT&T’s conduct
9 under federal law, their choice to rely exclusively on state law claims, as expressed on the face of
10 their well-pleaded complaint, requires remand.

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

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

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

27 Complete preemption is exceedingly rare. There is a presumption against it, which can be
28 overcome only by a clear congressional manifestation of intent to occupy an entire regulatory

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

AT&T nonetheless alleges in its removal papers—without discussion or support—that three federal statutes “completely preempt” Plaintiffs’ privacy-based state law claims: the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*; Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”), and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* (“ECPA”). Notice of Removal ¶ 7. *None* of these statutes completely preempts Plaintiffs’ claims. Indeed, not one of them (or their respective legislative histories) bears any expression of congressional intent to preempt the entire field of electronic communications and call records, much less the “clear” expression required for a finding of complete preemption. Nor has any state or federal court (with the exception of one

¹ Consequently, federal courts have only rarely found legislation to preempt state law completely. The Supreme Court has found complete preemption only as to Section 301 of the Labor Management Relations Act, Section 502(a) of ERISA, and sections of the National Bank 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 AT&T in its removal papers.

district court discussed below) ever held that FISA, Title III, or ECPA completely preempts corresponding state law claims.

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

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

2. FISA.

It is not clear why AT&T contends that FISA preempts Plaintiffs’ claims here, but the short answer to that contention is that it does not. No court has ever found that FISA completely preempts state law privacy claims. Nor can it be said to do so. FISA governs the use of pen registers and trap and trace devices used for the limited purpose of acquiring foreign intelligence information. 50 U.S.C. § 1842. Pen registers and trap and trace devices gather information

² AT&T’s reliance on *Boyle v. United States Techs. Corp.*, 487 U.S. 500 (1988) and *Tenet v. Doe*, 544 U.S. 1 (2005) in support of its contention that FISA, Title III, and ECPA completely preempt Plaintiffs’ claims is misplaced. *See* Notice of Removal ¶ 8. *Beneficial*, involved ordinary (not complete) preemption, and thus is inapposite on the removal issue. Moreover, *Beneficial* involved state law usury claims against 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).

electronically about the identity of persons making and receiving calls as well as other characteristics of the call, but not its substantive content.³

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

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

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

It is not at all clear that FISA has any application to AT&T's voluntary disclosure of the calling records of millions of its residential customers. In that case it could not preempt Plaintiffs' state law claims. Simply put, a statute cannot preempt what it does not cover. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.17 (1983); *Campbell v. General Motors Corp.*, 19 F. Supp. 2d 1260, 1272-73 (N.D. Ala. 1998). To the extent FISA does have some relevance, it shows a clear Congressional intention to permit suits where calling information is provided without the issuance of a FISA order. As discussed in Part I.D, *infra*, this is entirely

³ A pen register is a device that captures information about a telephone call, other than its contents, from the instrument originating the call. A trap and trace device captures similar information about the telephone receiving the call. 50 U.S.C. § 1841 (incorporating by reference the definitions of 18 U.S.C. § 3127).

⁴ Section 1843 authorizes the Attorney General to authorize the installation of these devices in an 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.

consistent with Section 2984 of the Public Utilities Code, which provides an affirmative defense for disclosure of phone records made pursuant to any legal compulsion. Plaintiffs' claims are thus in conformity—not in conflict—with FISA. As such, even ordinary preemption does not apply, let alone the "complete preemption" needed to support subject matter jurisdiction here.

3. ECPA and Stored Communications Act.

Nor does the ECPA or the Stored Communications Act ("SCA") completely preempt Plaintiffs' state law claims.⁵ Section 2708 of the SCA provides: "The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708 (emphasis added). Thus, while Section 2708 may limit the remedies available for a violation of the SCA to those provided in the statute, the language by its terms imposes that limitation only on the remedies available for violations of chapter 121 (i.e., for violations of the Stored Communications Act), not for violations of state or other federal laws. The statute leaves untouched the availability of remedies for violations of state law.⁶ "If Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear." *Empire*, 126 S. Ct. at 2125.

Other sections of the SCA also demonstrate that Congress did not intend to preempt all state law claims in the field of stored communications. Rather, the statute carefully and expressly imposes limitations on the applicability of state laws in select instances, while recognizing the continuing and parallel application of state law as a default. For example, Section 2710 of the SCA, which pertains to the disclosure of video tape rental and sale records, includes this provision: "The provisions of this section preempt only the provisions of State or local law that

⁵ Though AT&T fails to point to any particular portions of ECPA, Plaintiffs assume that the portion of ECPA it is relying on is the Stored Communications Act, chapter 121 of Title 18, 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.

⁶ Although the court in *Muskovich v. Crowell*, No. 3-95-CV-80007, 1995 WL 905403, 1995 U.S. Dist. LEXIS 5899 (S.D. Iowa Mar. 21, 1995) read the SCA differently, the court, without 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 require disclosure prohibited by this section.” 18 U.S.C. § 2710(f). If Congress had intended for
2 the SCA to oust all state laws, it would have been unnecessary for it to provide a specific
3 preemption clause in Section 2710. In fact, this language reflects Congress’ intent that states be
4 permitted to have their own parallel, concurrent, and *more restrictive* privacy laws relating to
5 stored communications, while preempting only laws that authorized *more disclosure* than allowed
6 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 AT&T’s assertion that Plaintiffs’ claims are completely preempted by various principles
18 of federal common law is equally faulty. See Notice of Removal ¶ 8. It is not enough for AT&T
19 simply to assert that Plaintiffs’ claims implicate foreign relations, foreign intelligence, national
20 security, or any other matter that might seem capable of adjudication in federal court. It must
21 either demonstrate that an existing federal common law completely preempts Plaintiffs’ claims, or
22 that the stringent conditions are met for fashioning a new federal common law to displace
23 Plaintiffs’ claims. AT&T can do neither here.

24 As an initial matter, AT&T 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, AT&T cannot seriously contend that this action involves
27 international diplomacy. As recognized by the relatively few cases that have invoked it, foreign
28 relations preemption comes into play, if at all, only when prosecution of a state law claim (or

1 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).⁷ While AT&T'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 AT&T—a private, domestic
7 company—will have any impact on the United States' relations with any foreign nation.⁸

8 Furthermore, AT&T cannot demonstrate that the federal government's interest in national
9 security or intelligence gathering warrants creation of a new federal common law. Absent
10 congressional authorization, courts may only create new federal common law if the operation of
11 state law governing the dispute would (1) "significant[ly] conflict" with (2) "uniquely federal
12 interests." *See Boyle*, 487 U.S. at 504; *Empire Healthchoice Assur., Inc., v. McVeigh*, 396 F.3d
13 136 (2d Cir. 2005), *aff'd*, 126 S. Ct. 2121 (2006). Cases justifying judicial creation of preemptive
14 federal rules are extremely limited: "[w]hether latent federal power should be exercised to
15 displace state law is primarily a decision for Congress,' not the federal courts." *Atherton v.*
16 *FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63,
17 68 (1966)). 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 AT&T 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 ⁷ 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 ⁸ To the extent AT&T asserts that the state secrets privilege is a principle of federal common law
28 that confers federal jurisdiction (*see* Notice of Removal ¶ 8) this privilege may not be asserted by
AT&T, 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 AT&T 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 AT&T that federal law or policy deemed lawful. That is not the case here.
13 As discussed in Part I.D, *infra*, AT&T 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 AT&T cites as potentially “authorizing” its conduct likewise provide
16 a defense for disclosures made pursuant to legal process. *See Notice of Removal ¶ 10* (citing 18
17 U.S.C. *§ 2511(2)(a)(ii)*; 27 U.S.C. *§ 2707(e)*; 18 U.S.C. *§ 2520(d)*). California law and federal
18 law are not in conflict (much less significant conflict), as legal process provides a defense under
19 either. This fact is fatal to AT&T’s claim of federal common law preemption, “unless and until
20 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 AT&T 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 ¶ 6*. 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 AT&T's
25 disclosure of customers' calling records is an affirmative defense that may or may not be
26 available for AT&T 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).⁹ Any issue as to whether AT&T’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 AT&T. *See* Notice of Removal ¶ 6.

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

27 ⁹ 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 Grable was given notice within the meaning of the federal statute is thus an essential element of
2 its quiet title claim, and the meaning of the federal statute . . . appears to be the only legal or
3 factual issue contested in the case.” *Id.* By contrast, in *Empire*, the heart of plaintiff’s case
4 turned not on the meaning of a federal statute, but rather on a disputed set of facts. Thus, *Empire*
5 involved a “fact-bound and situation-specific” inquiry that was unlikely to be controlling in other
6 cases, even though the suit arose because of plaintiff’s obligations under by the terms of its
7 contract with the government.

8 The issue potentially to be raised here—whether AT&T turned over its customers’ records
9 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 Defendants and in Any**
26 **Event Does Not Provide a Basis to Remove.**

27 AT&T also asserts that removal is proper because the Complaint allegedly “implicates . . .
28 the military and state secrets privilege” and because “no claims seeking to prove the existence of

1 a secret espionage relationship with the federal government may be adjudicated in the courts of
2 the United States.” Notice of Removal ¶¶ 7, 8. AT&T cites *Tenet v. Doe*, 544 U.S. 1 (2005),
3 which in turn explained the “*Totten*” doctrine first enunciated in *Totten v. United States*, 92 U.S.
4 105 (1875). These arguments fail for two independent reasons. First, they can be asserted only
5 by the federal government, which is not a party to this action. Second, an assertion of the state
6 secrets privilege or the *Totten* doctrine would not render those issues elements of Plaintiffs’ state
7 law causes of actions, and thus cannot support removal under the well-pleaded complaint rule,
8 any more than would assertion of any other federal immunity or defense.

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

11 It is beyond dispute that only the United States government can assert the state secrets
12 privilege. The state secrets privilege “belongs to the Government and must be asserted by it; it
13 can neither be claimed nor waived by a private party.” *United States v. Reynolds*, 345 U.S. 1, 7
14 (1953). *See also Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998) (same); *Ellsberg v.*
15 *Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983) (same); *Halkin v. Helms*, 690 F.2d 977, 991 (D.C.Cir.
16 1982) (same). Indeed, the Supreme Court has warned that the privilege is “not to be lightly
17 invoked” (*Reynolds*, 345 U.S. at 7), and has dictated the procedural requirements the government
18 must meet to assert it: “[t]here must be a formal claim of privilege, lodged by the head of the
19 department which has control over the matter, after actual personal consideration by that officer.”
20 *Id.* at 7-8; *accord Halkin*, 690 F.2d at 991.¹⁰

21 Likewise, no court has ever dismissed a case under *Totten* in which the United States, or
22 one of its agencies or employees was not a party, and in which the government had not requested
23 the dismissal. This is consistent with the fact that the interests sought to be protected by *Totten*

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

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

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

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

24 Even if properly raised, however, neither the state secrets privilege nor the *Totten* doctrine
25 would provide a basis for federal jurisdiction. These issues are not "embedded" elements that
26 Plaintiffs must prove; rather, they are evidentiary rules or bars that will at most be federal issues
27 "collateral" to the elements of Plaintiffs' claims. *See Gully*, 299 U.S. at 117-18. Thus, the well-
28 pleaded complaint rule precludes reliance upon them to confer jurisdiction. They must, like other

collateral federal issues, be considered and decided by the state courts before which state claims are filed.

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

Moreover, the privilege “may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.” *Ellsberg*, 709 F.2d at 57; *see also Kasza*, 133 F.3d at 1166.¹¹ This is because “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” *Reynolds*, 345 U.S. at 9-10; *see also In re United States*, 872 F.2d at 475 (“[A] court must not merely unthinkingly ratify the executive’s assertion of absolute privilege, lest it inappropriately abandon its important judicial role.”).

The potential need for a court to consider and apply this privilege provides no basis for federal jurisdiction. Indeed, given that the potential existence of a complete federal defense provides no grounds for federal jurisdiction (*see* Parts I(B), (D), *supra*), *a fortiori*, the possibility

¹¹ While proper assertion the state secrets privilege has occasionally led courts to dismiss an action in its entirety, *see, e.g., Kasza*, 133 F.3d at 1166, it is more common for the privilege to lead to a protective order or limitation on the evidence to be introduced, in accordance with the “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.

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

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

II. DEFENDANTS MAY NOT REMOVE UNDER SECTION 1442(a) BECAUSE THEIR ACTIONS WERE NOT DIRECTLY CONTROLLED BY A FEDERAL OFFICER OR AGENCY.

AT&T also seeks to remove pursuant to 28 U.S.C. § 1442(a)(1), claiming that "to the extent it acted at all, [it] acted at or under the direction of agencies or officers of the United States, or persons acting under such agencies or officers, under color of office." Notice of Removal ¶ 9. AT&T's removal notice, however, is fatally defective; it fails to allege that AT&T was acting pursuant to the government's orders or compulsion—the *sine qua non* of Section 1442(a) removal.

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

19 AT&T's reliance on *Camacho* is misplaced. See 868 F.2d 482. In *Camacho*, the
20 defendant telephone companies were sued for their role in aiding federal agents in conducting a
21 wiretap, *as required by a federal court order* issued under Title III. *Id.* at 489. In their removal
22 petition the defendants alleged that "at all times referred to in said complaint, co-defendants . . .
23 were acting under express orders, control and directions of federal officers who were acting under
24 color of their office as federal agents and in the performance of their official duties." *Id.* at 486.
25 It was this uncontradicted assertion of compulsion that established the predicate for Section 1442
26 removal.

27 Here, in contrast, the Complaint alleges precisely the opposite. Plaintiffs specifically
28 allege that AT&T voluntarily turned over customer calling records to the NSA. Complaint ¶¶ 23,

41. They further allege that Qwest refused the government's request to turn over its customers' records due to lack of authorization from the government, thus buttressing the point that AT&T's actions were voluntary not compelled. Complaint ¶ 39; RFJN Exh. H. AT&T's removal notice, on the other hand, lacks even the most rudimentary allegations needed to establish that its actions were the result of government compulsion. It alleges only that "to the extent [AT&T] acted at all, [it] acted at or under the direction of agencies or officers of the United States, or persons acting under such agencies or officers, under color of office." Notice of Removal ¶ 9.

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

CONCLUSION

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

Dated: June 30, 2006

FENWICK & WEST LLP

By: /s/ Laurence F. Pulgram

Laurence F. Pulgram

Attorneys for Plaintiffs

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

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

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SAN DIEGO/IMPERIAL
COUNTIES
Dan Blair-Loy

FENWICK & WEST LLP
Laurence F. Pulgram, Jennifer L. Kelly,
Saina Shamilov, Candace Morey