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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DENNIS P. RIORDAN, et al., Plaintiffs, v. VERIZON COMMUNICATIONS INC., a corporation; and DOES 1 through 20, Defendants.	Case No. C-06-3574 VRW **PLAINTIFFS' JOINT REPLY IN SUPPORT OF MOTIONS FOR REMAND** Date: August 24, 2006 Time: 2:00 p.m. Dept: 6, 17th Floor Judge: The Honorable Vaughn R. Walker
TOM CAMPBELL, et al., Plaintiffs, v. AT&T COMMUNICATIONS OF CALIFORNIA, et al., Defendants.	Case No. C-06-3596 VRW

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INTRODUCTION

Contrary to Defendants' assertions, Plaintiffs' Motions to Remand do not devalue the federal interest in protecting national security. The significance of that interest is manifest. However, Plaintiffs did not bring these lawsuits against the NSA, the FBI, or any other governmental agency. They do not seek to regulate the actions of the government. These are lawsuits against private telecommunications providers seeking to compel them to obey state laws regulating their conduct—laws that are distinct from, but in harmony with, similar federal legislation. When the conduct of private corporations violates important rights under state law, and that conduct is not compelled by federal law and, indeed, may violate that law as well, the federal interest in national security does not serve as a barrier to vindication of the state's legitimate interest in seeing that private actors comply with state laws.

Defendants' repeated invocation of a federal *interest* cannot suffice to establish federal *jurisdiction*. Determination of jurisdiction—the first order of business for any federal court—depends on rigorous adherence to long-standing principles including the "well pleaded complaint" rule. When applied, rather than glossed over, those principles all require remand here.

First, a thorough analysis of the federal statutes and their legislative histories reflects repeated and emphatic congressional intent to allow state law regulating telecommunications records to coexist with federal. There is nothing remotely approaching the "extraordinary" and "unusually powerful" congressional intent necessary to transmute a potential preemption defense into "complete preemption" giving rise to federal jurisdiction. Part I, *infra.*

Second, Defendants do not even attempt to prove the "significant conflict" with federal law that is indispensable to creation of federal common law preemption. Rather Defendants concede (indeed, they affirmatively argue) that Plaintiffs' state law claims afford full immunity where federal authorization exists. Part II, *infra*.

Third, Plaintiffs' claims lack two indispensable prerequisites for finding jurisdiction due to an embedded federal issue—that the issue *necessarily* arises as an element of Plaintiffs' claims, and that it also presents a question of *interpretation* of federal law. Part III, *infra*.

Fourth, Defendants still supply no proof that their decision to turn over customer call

records was compelled, directed or controlled by any federal order or officer. Part IV, *infra*.

Finally, this Court's remand decision has been made easier by its recent decision of the *Totten* and state secrets issues in *Hepting v. AT&T Corp.*, No. C-06-672, 2006 WL 2038464, 2006 U.S. Dist. LEXIS 49955 (N.D. Cal. Jul. 20, 2006). In fact, Plaintiffs here have presented ***explicit governmental admissions of the existence of the call records program*** that were not before the Court in *Hepting*. The televised acknowledgement of that program by two fully informed U.S. Senators makes the *Hepting* reasoning all the more applicable here. *See* p. 21, *infra*. The *Hepting* ruling makes clear that these actions are not barred at the threshold but may proceed in state court, where the privilege can be asserted and applied as appropriate.

For each of these reasons, Defendants err in contending that Plaintiffs have missed the forest (of national security interest) for the trees (of jurisdictional jurisprudence). Verizon Opp'n 11.[1] To the contrary, the Court's course through that forest is found on the well-worn path of established jurisdictional principles. The claims in this action do not arise under federal law. They should be remanded to the state court.[2]

ARGUMENT

I. PLAINTIFFS' STATE LAW CLAIMS ARE NOT COMPLETELY PREEMPTED BY ANY FEDERAL STATUTES.

Complete preemption by a federal statute is the exception, not the rule. A statute must have "unusually 'powerful'" preemptive force before it will be construed as converting a plaintiff's state law claim into a federal claim. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (*quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983)); *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 304 (2d Cir. 2004) (preemptive force of federal statute must be "extraordinary"). Even though there may be an "ironclad" preemption defense in state court, that "does not mean that [the state law claim] is 'completely

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[1] "Verizon Opp'n" and "AT&T Opp'n" refer to the Defendants' respective Oppositions to Plaintiffs' Motions to Remand. "Pl.'s. Br." refers to Plaintiffs' Motions for Remand.

[2] Plaintiffs have only just been informed that the United States intends to file a motion to intervene and a statement of interest in opposition to remand in this action. Plaintiffs will seek leave to address whatever arguments the government has to make once it serves its papers.

preempted' in the choice-of-law sense that governs removal jurisdiction." *In re Miles*, 430 F.3d 1083, 1095-96 (9th Cir. 2005) (Berzon, J., concurring in part and concurring in result); *Caterpillar, Inc. v. Williams*, 482 U.S. 383, 393 (1987). "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 HealthChoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2135 (2006).

A. Neither the Wiretap Act Nor the Stored Communications Act Completely Preempt Suits Under State Law.

In 1986 Congress passed the Electronic Communications Privacy Act ("ECPA"), amending Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Title I of ECPA (usually referred to as the "Wiretap Act," *see United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998)), addresses the interception of wire and electronic communications. S. REP. NO. 99-541, at 1-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3555-57. Title II, the Stored Communications Act ("SCA"), *see Smith*, 155 F.3d at 1055, addresses issues relating to accessing and disclosing stored communications. S. REP. NO. 99-541, at 3.

Throughout the Wiretap Act and SCA there is a consistent theme: that there is room in the statutory scheme for the application of state law.[3] One simply cannot view these numerous and explicit examples of legislative intent to preserve state law without concluding that there is a total absence of the clear congressional intent needed to establish a preemptive force so powerful that ECPA must be held to completely preempt state law, thus creating a federal cause of action.

[3] That theme is apparent both in the original enactment of Title III and its amendment by ECPA. *See, e.g.*, 18 U.S.C. § 2511 (*see* S. REP. NO. 90-1097 (1968), *reprinted* in 1968 U.S.C.C.A.N. 2112, 2181, commenting on subsections c and d of section 2511(1): "There is no intent to preempt State law."); 18 U.S.C. § 2516(2) (allowing state officers to obtain interception orders only if authorized by and issued in conformity with state law); 18 U.S.C. § 2512 (*see* S. REP. NO. 90-1097, 1968 U.S.C.C.A.N. at 2183: "There is no intent to preempt State law."); 18 U.S.C. §§ 2703(b)(1)(B), 2703(c), and 2703(d) (preserving state law requirements when state officers seek orders under section 2703; *see* H. R. REP. NO. 99-647 at 68-69 (1986) ("Thus, state laws such as those found in . . . California . . . would remain unaffected with respect to access by state government officials."); 18 U.S.C. § 2710 ("Section 2710(f) explicitly preserves the rights of consumers to seek redress under state laws that may provide a greater degree of protection than is afforded by the federal statute." S. REP. NO. 100-599 at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342x13).

See Beneficial, 539 U.S. at 6. Defendants' citations to other cases construing other federal statutes lend little to the underlying analysis of whether ECPA completely preempts Plaintiffs' state law claims. As the *Beneficial* Court made clear, the dispositive question is "whether Congress intended the federal cause of action to be exclusive." 539 U.S. at 9 n.15. The congressional intent with respect to ECPA was quite to the contrary.

1. The Wiretap Act.

Section 2520 of the Wiretap Act provides a federal cause of action for those whose wire or electronic communications have been intercepted. 18 U.S.C. § 2520(a). The legislative history of this provision could not contain a clearer statement of congressional intent that state remedies be preserved. The Senate Report explicitly states: "The scope of the [civil] remedy [for wiretapping offenses] is intended to be both comprehensive and exclusive, but *there is no intent to preempt parallel State law*." S. REP. NO. 90-1097, 1968 U.S.C.C.A.N. at 2196 (emphasis added). Thus, as exemplified most recently by the California Supreme Court's decision in *Kearney v. Salomon Smith Barney, Inc.*, 45 Cal. Rptr. 3d 730 (2006), both state and federal courts hold that the federal act does not preempt state law civil remedies. *Id.* at 738 (noting that, in the over 30 years since the Court first addressed the issue in *People v. Conklin*, 12 Cal. 3d 259 (1974), there have been no developments in the law that would warrant reconsideration of the Court's conclusion that the Wiretap Act does not preempt state claims); *see also Whitaker 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).

Defendants neither discuss nor distinguish the case law cited by Plaintiffs. Rather, they cite a number of criminal cases addressing the admissibility in *federal prosecutions* of evidence obtained through electronic surveillance where the wiretap orders in question had been issued under various permutations of state or federal law. Not one of the cases involved the question presented here: whether federal law preempts state law *civil* causes of action under state wiretap statutes. As the cases cited by Plaintiffs hold, it does not.

2. The Stored Communications Act.

Defendants are wrong when they argue that 18 U.S.C. section 2708 provides the exclusive

remedy for the conduct at issue here. This section is the counterpart to 18 U.S.C. section 2518(10)(c), both of which were added by ECPA for a very specific and limited purpose: to prevent defendants in a criminal prosecution from suppressing evidence based on electronic communications or customer records obtained in violation of ECPA's provisions.

At the time Congress enacted ECPA, the Wiretap Act set forth a statutory exclusionary rule for unlawfully intercepted wire or oral communications. *See* 18 U.S.C. §§ 2515, 2518(10)(a),(b). ECPA brought the Wiretap Act into the electronic age by making it applicable to the interception of electronic communications, as well. S. REP. NO. 99-541, at 1-3. However, at the urging of the Justice Department, Congress decided not to extend the statutory exclusionary rule to unlawful interceptions of electronic communications. Instead, Congress added subsection (c) to section 2518(10), the provision that sets out the procedures to be used in moving to suppress unlawfully intercepted *wire or oral* communications. Thus section 2518(10)(c) provides:

> The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for *nonconstitutional* violations of this chapter involving such communications. (emphasis added).

The legislative history of this subsection makes clear what Congress had in mind:

> Subsection 101(e) of the Electronic Communications Privacy Act amends subsection 2518(10) of title 18 to add a paragraph (c) which provides that with respect to the interception of *electronic communications*, the remedies and sanctions described in this chapter are the only judicial remedies and sanctions available for nonconstitutional violations of this chapter involving such communications. In the event that there is a violation of law of a constitutional magnitude, the court involved in a subsequent trial will apply the existing Constitutional law with respect to the exclusionary rule. *The purpose of this provision is to underscore that, as a result of discussions with the Justice Department, the Electronic Communications Privacy Act does not apply the statutory exclusionary rule contained in title III of the Omnibus Crime Control and Safe Streets Act of 1968 to the interception of electronic communications.*"

S. REP. NO. 99-541, at 23 (emphasis added); *see also* H. R. REP. NO. 99-647, at 75 (1986).

Section 2708 was intended to fulfill this same purpose with respect to the unlawful accessing or disclosure of stored communications and customer records. That is made clear by the House Report on section 2708, which states: "[T]he remedies and sanctions described in this

chapter [121] are the only remedies and sanctions available for non-constitutional violations of this chapter [121]. *See discussion of Section 101(e) of the bill, supra*." H. R. REP. NO. 99-647, at 75 (1986) (emphasis added).[4]

Given the similarity of the language between the two provisions, and given the Report's express reference back to the discussion of section 101(e), there is no doubt that the purpose and meaning of the two provisions is the same: to make clear that only the limited protection of the Fourth Amendment applies to efforts to suppress evidence gathered in violation of ECPA. That is precisely the interpretation given to section 2708 by the Ninth Circuit and other courts. *See, e.g. United States v. Smith*, 155 F.3d at 1056 (section 2708 precludes suppression as a remedy for violation of SCA); *United States v. Sherr*, 400 F. Supp. 2d 843, 848 (D. Md. 2005) (same); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (same).

Thus, as noted in Plaintiffs' opening brief, the use of the words "of this chapter" in section 2708 is, indeed, significant. Rather than being "exclusive of nothing," *see* AT&T Opp'n 7, it indicates that only the civil and criminal remedies provided in sections 2707 and 2701(b), respectively, are available to redress violations of the SCA. It does not indicate intent to preempt state civil remedies, let alone remake them into federal claims. *See Lippit v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1042 (9th Cir. 2003) (holding no complete preemption where statute provided exclusive jurisdiction only for liabilities "created by this chapter").

When Congress intends a provision to apply beyond the chapter in which it appears, it knows how to say so. For example, section 2520(d) provides: "A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought *under this chapter or under any other law*." (emphasis added); *cf. section* 2703(e) ("no cause of action shall lie *in any court*"). Congress did not use such language in section 2708

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[4] The discussion of section 101(e) in the House Report is an abbreviated version of that which appears in the Senate Report, which further expressly emphasizes that the intent to preempt is directed toward criminal law: "Subsection (e) amends section 2518(10) to provide that the remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions available for non-constitutional violations of this chapter involving such communications. In the event that there is a violation of law of a constitutional magnitude the court involved *in a subsequent criminal trial* will apply the existing constitutional law with respect to the exclusionary rule." *Id.* at 48 (emphasis added).

for good reason. Making the SCA the exclusive remedy for any conduct that falls within its terms would not only preclude state court actions; it would preclude actions under other federal laws as well, including the Communications Act of 1934 (47 U.S.C. § 222) and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Congress had no such intent: "[T]he [ECPA] does not amend the Communications Act of 1934. Conduct in violation of that statute, will continue to be governed by that statute." S. REP. NO. 99-541, at 23;[5] *see also Theofel v. Farley-Jones*, 359 F.3d 1066, 1072-77, 1078 (9th Cir. 2004) (holding that defendants' conduct violated both the SCA and the Computer Fraud and Abuse Act, and concurrently reinstating plaintiffs' state law claims).

In addition to the absence of any evidence of a congressional intent for the SCA to completely preempt Plaintiffs' state law claims, the Supreme Court's decision in *Beneficial* counsels against finding complete preemption for two other reasons. First, the *Beneficial* Court noted the "longstanding and consistent construction of the National Bank Act as providing an exclusive federal cause of action for usury against national banks." *Beneficial*, 539 U.S. at 10. That "longstanding and consistent construction" is wholly absent here.[6]

Second, the *Beneficial* Court found significant the long history of protecting national banks from hostile state regulation. *Id.* In the area of telecommunications, by contrast, there is a long history of concurrent regulation by state and federal agencies. Indeed, the Communications Act expressly reserves to the states the regulatory authority over intrastate telecommunications services, going so far as to preclude FCC regulation of the carriers' practices in the reserved arena. 47 U.S.C. § 152(b).[7] This history of recognizing the important role to be played by

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[5] This language follows immediately after the language discussed earlier, explaining that the purpose of the exclusive remedy provisions was to prevent a nonconstitutional exclusionary rule.

[6] There is but one, lone district court case holding that section 2708 preempts any other cause of action—state or federal—for conduct that also violates the SCA. *Muskovich v. Crowell*, No. 3-95-CV-80007, 1995 WL 905403, 1995 U.S. Dist. LEXIS 5899 (S.D. Iowa Mar. 21, 1995). *Muskovich* makes no mention of the legislative history discussed in the text. It is too slim a reed to sustain the weight defendants ask it to bear.

[7] Section 152(b) provides in pertinent part: "Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier . . ." (emphasis added).

regulatory statutes such as California's Public Utilities Code ("P.U.C.") section 2891 is still further evidence of the absence of federal intent to preempt completely state law claims.

B. The Foreign Intelligence Surveillance Act ("FISA") Does Not Completely Preempt Plaintiffs' State Law Claims.

The essential premise of both *Beneficial* and *In re Miles*, is that, by providing a specific federal statutory cause of action, Congress may demonstrate its intent to provide "the exclusive cause of action" such that "any claim purportedly based on [a] preempted state law is considered, from its inception, a federal claim and therefore arises under federal law." *Miles*, 430 F.3d at 1088, citing *Beneficial*, 539 U.S. at 8-9. In *Beneficial*, Section 86 of the National Bank Act specified a federal cause of action for usury that "supersede[d] both the substantive and the remedial provisions of state usury laws and create[d] a federal remedy for overcharges that is exclusive." *Id.* at 10. In *Miles*, Section 303(i) of the Bankruptcy Code provided a cause of action for bad faith filing of involuntary bankruptcy petitions, including provisions for damages, attorneys' fees, and potential bonds to be supplied by the petitioner. 430 F.3d at 1090. By contrast, FISA does not specify any remedy for unlawfully turning over customer records and therefore cannot possibly be considered to have specified the exclusive one. Instead FISA creates a defense limited to the "good faith" production of records, demonstrating that certain claims *must* exist and are not preempted.

The FISA provision that could potentially apply to the call records at issue in this action is found in 50 U.S.C. section 1861, familiarly known as section 215 of the Patriot Act. It allows the FBI to obtain orders for third party production of business records. Section 215 reaches far beyond communications records, however. It applies to "any tangible things . . . records and other items," including records ranging from library usage, to psychiatric treatment, to personal finance. Congress specified no federal remedy for violations of section 215.[8] Congress therefore obviously has not provided a remedy that could be deemed the "exclusive" cause of action into

[8] *Compare* 50 U.S.C. § 1810 (creating a civil remedy for violations of the electronic surveillance provisions of FISA), § 1828 (creating a civil remedy for violations of the FISA provisions relating to physical searches).

which state law causes of action have been merged.

Congress simultaneously contemplated that there *would* be civil claims with respect to production of records in response to section 215 orders, because it provided, in section 215(e), a defense limited to good faith compliance. "A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production." 50 U.S.C. § 1861(e). On its face, FISA therefore contemplates that, in the absence of a section 215 order (as alleged here), or if excessive disclosures are made in bad faith response to such an actual order, injured parties will have causes of action and remedies under other provisions of state and federal law.[9] Indeed, to conclude otherwise would misinterpret Congress's silence as to the particular remedies available to preclude *any* remedy, even for victims of malicious turnover to the government of a sweeping array of highly sensitive "tangible items," and regardless of whether a section 215 order even exists.

Ignoring these fatal defects in their complete preemption theory, Defendants instead refer to the overarching framework of FISA as evidencing an undefined Congressional intent to completely preempt Plaintiffs' claims here. Despite it being their burden to establish complete preemption (*Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)), Defendants cite no cases interpreting FISA in this manner;[10] nor do they cite a shred of legislative history evidencing such an intent. Most importantly, however, Defendants ignore the language of the very statutes that they cite (AT&T Opp'n 8-9 & n.6), which also clearly contemplate state court litigation. For example, section 1806(f), in pertinent part, provides procedures for consideration of the propriety of FISA orders "[w]henever . . . any motion or request is made by an aggrieved person *pursuant to any other statute* or rule *of . . . any State before any court or other authority of . . . any State* to discover or obtain applications or orders or other materials relating to electronic surveillance . . . ." 50 U.S.C. § 1806(f). Identical language is found in 50 U.S.C. section 1845(f) (relating to

[9] If the court were to conclude that FISA preempts causes of action not specified in that statute, it would render the defense in § 1861(e) "mere surplusage," thereby violating a basic canon of statutory construction. *See, e.g., United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003).

[10] *Compare ACLU Found. of So. Cal. v. Barr*, 952 F.2d 457 (D.C. Cir. 1991) (addressing not whether claims exist against private parties acting outside of FISA, but only whether there was a right of action against the *government* generally to enjoin FISA investigations).

pen registers and trap and trace devices) and 50 U.S.C. section 1825(g) (physical searches).[11] S*ee also* 50 U.S.C. §§ 1805(i), 1842(f) (both providing that "no cause of action shall lie *in any court*" against any telecommunications provider acting "in accordance with a [FISA] order," but *not* precluding any claim based on conduct in the absence of such an order)(emphasis added). Thus, to the extent that other provisions of FISA are relevant to whether Plaintiffs' state law claims are completely preempted, they stand as unmistakable proof that Congress contemplated that the state courts would play host to litigation of state law claims implicating FISA investigations.

Finally, Defendants note that provisions in the Wiretap Act and the SCA take account of one another's provisions as well as those of FISA. That is not surprising. All three deal with overlapping subject matter, and they must not work at cross-purposes. But that does not mean that Congress ordained complete preemption of state law remedies. As demonstrated above, both the Wiretap Act and the SCA preserve state law remedies. The same is true of FISA. Although a telephone conversation *might* have been intercepted pursuant to either the Wiretap Act or FISA, and customer records *might* have been turned over pursuant to either the SCA or FISA, if they were not, none of these enactments stands as a bar to a plaintiff's claims.

II. PLAINTIFFS' CLAIMS ARE NOT COMPLETELY PREEMPTED BY FEDERAL COMMON LAW.

Defendants do not dispute Plaintiffs' principal points as to why federal common law does not govern their state law claims: (i) the existing common law of "foreign relations" does not apply; (ii) there is no justification for judicial creation of a new federal common law where Congress has expressly spoken by statutes with which California law does not conflict; and (iii) the controlling principles for preemption by federal common law are found in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). Verizon completely ignores the *Boyle* framework, however;

[11] These statutes provide that, for state court litigation, the federal district court in the state in which the litigation is pending will make any determination as to the lawfulness of a FISA order in question. But the existence of this procedure—in the event that a FISA order actually exists, and its lawfulness becomes an issue—by no means suggests that state law claims are preempted where no FISA order is alleged or shown. To the contrary, the very fact that these statutes do not foreclose or require removal of the entire state law action, but rather extract a particular issue that, alone, would be adjudicated by the federal court, confirms that no preemption has occurred. In all events, section 1861, the business records provision, contains no comparable terms.

AT&T claims that *Boyle* controls, but distorts its reach. Verizon Opp'n 7-10; AT&T Opp'n 11 Thus, rather than apply *Boyle's* carefully articulated analysis, Defendants would swap it for a rule of super-preemption—displacing any state law rules having an ancillary relationship to national security. This simply is not the law.

While Defendants go to extravagant lengths to articulate a uniquely federal interest in national security, that interest alone simply cannot establish federal jurisdiction. Well settled Supreme Court precedent requires a *significant conflict* between state and federal law as a *precondition* for displacing state law with a federal common law rule. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994). "The involvement of 'an area of uniquely federal interest … establishes a *necessary, not a sufficient,* condition for the displacement of state law.'" *Empire HealthChoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2132 (2006) (*quoting Boyle*, 487 U.S. at 507) (emphasis added).[12] If a defendant fails to demonstrate significant conflict between an identifiable federal policy and the operation of state law, federal common law does not govern and the case must be remanded. *See Empire,* 126 S. Ct. at 2132-33.

Here, Defendants have demonstrated no conflict at all between section 2891 of the California P.U.C. or the state Constitutional right to privacy and any federal policy or interest underlying ECPA, the SCA, FISA or Title III. *See Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 69 (1966) (federal statutes dealing with subject are prime repositories of federal policy, and starting point for conflict analysis). Defendants do not dispute that California law provides the same defenses (*e.g.*, lawful process) that protects national interests in intelligence-gathering under the federal statutes. *See* Pl.'s Br. 16. Defendants instead speculate that state law claims could "interfere with the [] government's ability to exercise its national security power." Verizon Opp'n 10, 11.[13] But such speculation does not satisfy the conflict requirement of *Boyle*. *See*

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[12] Indeed, the circuit court in *Empire* affirmed dismissal for lack of federal subject matter jurisdiction due to the defendant's "inability to meet the second, 'significant conflict,' part of the [*Boyle*] test." *See Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 150 (2d Cir. 2005) (Sack, J. concurring), *aff'd*, 126 S. Ct. 2121 (2006).

[13] *See also* AT&T Opp'n 2 ("to the extent state law purported to regulate or enjoin federal intelligence activities, it would be wholly displaced by federal common law").

Empire, 396 F.3d at 141.[14] In all events, such speculation is unfounded here. These state laws accommodate, and in no way impede, lawful federal efforts because they incorporate defenses coextensive with federal law. "Apart from the highly abstract nature of [the federal] interest, there has been no showing that state law is not adequate to achieve it." *Wallis,* 384 U.S. at 71.

Rather than attempt the requisite proof of conflict under the *Boyle* analysis, Defendants exaggerate cases that do not stretch as far as Defendants contend. First, *Boyle* itself does not support the assertion that federal common law completely displaces state law simply because a "federal interest in military and defense matters is concerned." AT&T Opp'n 11. Indeed, if having an incidental effect on national security or military defense sufficed to displace all state laws, the *Boyle* Court would not have devoted several pages to *locating a conflict* in the policies underlying the Federal Tort Claims Act ("FTCA"). 487 U.S. at 509-512. Nor would it have acknowledged that "no one suggests that state law would generally be preempted" where "the contractor could comply with both its contractual obligations and the state-prescribed duty of care." *Id.* at 509.

Boyle only says that the federal common law immunizes contractors from civil liabilities for defects in military designs where the state tort law would impose a duty "precisely contrary to the duty imposed by the Government contract." *Id* at 509. Moreover, *Boyle* creates a federal common law in the *absence* of explicit and comprehensive Congressional directives on point — the exact opposite of this case, where Congress has spoken in detail.[15] Aside from providing the proper touchstones for the preemption analysis, *Boyle* has no applicability here.

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[14] Verizon (but not AT&T) also asserts the need for federal common law "because of the need for uniform rules affecting national security." Verizon Opp'n 9. But, "uniform federal law need not be applied to all questions in federal government litigation." *Empire,* 126 S. Ct. at 2131 (explaining *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943)). Indeed, the Supreme Court rejects generalized pleas for uniformity, noting that "[t]o invoke the concept of 'uniformity,' [] is not to prove its need." *Atherton v. FDIC,* 519 U.S. 213, 220 (1997).

[15] The *Boyle* Court found that imposing state duties of care on military designs conflicted with policies underlying the FTCA, because the "selection of the appropriate design for military equipment … is assuredly a discretionary function" that is excepted from suit under the FTCA. *Id.* at 511. Absent explicit rules in the FTCA, the Court created a federal common law of immunity and defined the circumstances under which it would apply. *Id.* at 509-512. Here, however, where Congress has extensively legislated the scope of defenses and immunities necessary to protect federal interests, there is no cause for the courts to re-define those limits.

Likewise, *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996), does not apply. That case held that federal common law governed the *construction* of a subcontract let under a prime contract with the government to develop a weapons system. *Id.* Notwithstanding the dicta Defendants extract from *New SD*, the opinion reaches only construction of defense procurement contracts; it certainly does not mandate removal anytime "the case concerns" a contract relating to national security.[16] *Cf.* Verizon Opp'n 9. As a matter of *stare decisis*, the *New SD* court felt itself bound to follow a factually indistinguishable pre-*Boyle* decision. 79 F.3d at 954 (applying *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th Cir. 1961)). Nothing warrants *extending New SD* to completely different factual scenarios. Here, there is no government contract even alleged, much less to be interpreted. The issue of whether to construe the terms of a government procurement contract under state or federal law will never arise. *New SD* simply has no bearing on this jurisdictional dispute.

Other authorities Defendants cite, while mentioning national security or defense, have nothing to do with whether the courts may create a federal common law to displace state laws—let alone base federal subject matter jurisdiction on such preemption.[17]

III. PLAINTIFFS' CLAIMS DO NOT INCLUDE AN EMBEDDED ELEMENT NECESSITATING INTERPRETATION OF FEDERAL LAW.

All parties agree that *Grable*, as interpreted by *Empire*, sets forth the relevant standard for determining when a state law claim will be treated as "arising under" federal law for purposes of removal jurisdiction. These Supreme Court decisions make it crystal clear that it is *not enough* that ultimate resolution of a state law claim requires consideration of federal issues, even

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[16] Indeed, even in the limited arena of contract interpretation, the reasoning behind *New SD* has been criticized. *See Woodward Governor Co. v. Curtiss-Wright Flight Sys.*, 164 F.3d 123, 128 (2d Cir. 1999). The *Woodward* court endorsed *Northrop Corp. v. AIL Sys. Inc.*, 959 F.2d 1424 (7th Cir. 1992), over *New SD*, because *Northrop* "resisted the temptation to create a bright-line rule applying federal common law to all government procurement contracts relating to national defense, principally because so facile a rule would conflict with *Boyle*." *Id.*

[17] *U.S. v. Pappas*, 94 F.3d 795 (2d Cir. 1996), is inapposite. There the court applied federal common law to interpret a confidentiality provision in a contract between the U.S. government and an individual. *Id.* at 801. While the court held that "the *contract issues* are governed by federal common law" (*id.*), this in no way suggests that federal common law governs all issues in every case related to national security.

important, disputed, and potentially dispositive ones. Rather, *Grable's* first element requires that the federal issue be "embedded" within the affirmative elements of the state law claim itself. Issues arising only as a matter of defense, evidentiary privilege, or even so-called "threshold issues of justiciability" do not satisfy this requirement. *See* Pl.'s Br. 17-18, 21-23 (and cases cited). Further, *Grable's* second element requires a dispute over the *interpretation* of the federal law itself. A disputed factual issue, the resolution of which will determine the outcome under federal law, does not satisfy this requirement. *See id*. at 18-19 (and cases cited).

Defendants seek to blur these two elements, implying that there is no clear test for determining when a state law claim arises under federal law, and that the Court may balance myriad factors, or focus solely on the strength of the purported federal interest at stake, to determine whether a claim belongs in federal court. *See* Verizon Opp'n 22;[18] AT&T Opp'n 17. But this approach ignores the facts in *Grable*, the law in *Empire*, and the subsequent decisions in this District—all of which confirm that the federal issue must be a *necessary* element of the plaintiff's affirmative claim *and* that the dispute must turn on the *interpretation* (not mere application) of federal law.[19] *See* Pl.'s. Br. 16-19 (and cases cited therein); *see also County of Santa Clara*, 401 F. Supp. at 1025-1027.[20]

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[18] In support of this argument, Verizon relies on *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986). *Merrell Dow*, however, was decided nearly a decade before the Supreme Court delineated its three part test in *Grable* and *Empire*.

[19] Verizon's reliance on cases purportedly finding "arising under" jurisdiction under *Grable* (*see* Verizon Opp'n 12 n.7) does not support its argument that *Grable* requires anything less. Each of those seven cases involved federal issues that were embedded elements within the plaintiff's claims. Additionally, four of the seven plainly necessitated an interpretation of federal law. *See Nicodemus v. Union Pac. Corp*., 440 F.3d 1227, 1234-1237 (10th Cir. 2006); *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806-808 (4th Cir. 1996); *County of Santa Clara v. Astra USA, Inc*., 401 F. Supp. 2d 1022, 1025-1027 (N.D. Cal. 2005); *Broder v. Cablevision Sys. Corp*., 418 F.3d 187, 194-196 (2d Cir. 2005). Of the remaining three, two involved claims governed by federal common law, an independent basis for jurisdiction (*Almond v. Capital Props., Inc.*, 212 F.3d 20, 22-24 (1st Cir. 2000) and *Price v. Pierce*, 823 F.2d 1114, 1118-20 (7th Cir. 1987), and one did not even involve a dispute over removal jurisdiction. *Municipality of San Juan v. Corporacion para el Fomento Economico de la Cuidad Capital*, 415 F.3d 145, 148 n.6 (1st Cir. 2005).

[20] In *County of Santa Clara*, Judge Alsup lays out the same requirements set forth in *Grable* as a 5-part test, although the analysis overlaps entirely. Defendants have no response to this case, nor to any of the four other cases from this District cited in Plaintiffs' Brief at Part I(D).

A. The Existence or Non-Existence of Federal "Authorization" Does Not Create "Arising Under" Jurisdiction.

To meet their burden to show that Plaintiffs' claims arise under federal law, Defendants must prove *both* (1) that a lack of "federal authorization" for Defendants' turnover of records is an affirmative element of Plaintiffs' claims; *and* (2) that determining whether any such authorization exists requires interpretation of federal law. Defendants can prove neither.

1. Lack of Authorization Is Not an Affirmative Element.

a. Lack of Authorization Is Not an Element of Plaintiffs' Section 2891 Claim.

Defendants concede, as they must, that "good faith compliance with the terms of a state or federal court warrant or order or administrative subpoena" (P.U.C. § 2894(a)) is an affirmative defense. AT&T Opp'n 15 & n.12; Verizon Opp'n 15. They strain, however, to characterize section 2891(d)(6) ("information provided to a law enforcement agency in response to lawful process") as something else. The legislative history resolves any confusion about the interplay of the two sections, demonstrating that the two provisions share the same purpose, function and status—they are both affirmative defenses, not elements of Plaintiffs' claims.

Section 2891 was enacted in 1986. Cal. Pub. Util. Code § 2891, Stats. 1986, c.821, § 2. Fairly soon thereafter, it became apparent that telephone companies were inadequately protected from liability if they furnished customer records in response to process they believed lawful, but that later was held unlawful. Accordingly, in 1992 the companies sponsored SB 1450, which became section 2894, to clarify the meaning of section 2891(d)(6).[21] Far from citing a purpose for section 2894 wholly different than that of section 2891(d)(6), as Defendants now suggest, the sponsoring companies characterized it as "subpoena *clarification* legislation" and explained that it would "provide *additional assurances* that radiotelephone utilities are protected from civil

[21] *See* Plaintiffs' Joint Request for Further Judicial Notice in Support of Motion for Remand ("JRFJN") Ex. C, Senate Judiciary Committee Background Information, SB 1450, 1992-263 LRI, p. 12, question 2 (listing Allied Radiotelephone Utilities of California ("ARUC") as sponsor).

liability" because the existing provisions (in section 2891(d)(6)) were "ambiguous."[22]

Likewise, the legislative history is replete with explanations that the bill simply "expands the existing immunity" afforded to telephone utilities.[23] "Existing law provides [companies] with immunity only if the information is in response to 'lawful process.' . . . . SB 1450 expands and specifies the immunity so that [companies] do not need to make independent judgments as to the release of subscriber information." JRFJN Ex. G Enrolled Bill Report (1992-263 L.R, p.53/112). *See also* Senate Judiciary Committee, Background Information for SB 1450 ("SB 1450 would bring California law into conformity with the Federal standard, which is that any information provided to law enforcement 'in good faith compliance' immunizes the utility from liability under California's right to privacy laws.") (1992-263 L.R, p.12-13). Even the history quoted at page 15 of Verizon's opposition (discussing a 1993 amendment to section 2894) reiterates the common understanding that the purpose of section 2894 is to expand the "existing immunity" in section 2891, in that case to telephone companies as well as "radiotelephone" companies. Senate Judiciary Cttee, California Bill Analysis, AB 1740 (p.20 of 71, 1993-152 L.R).[24]

While section 2894(a) certainly was intended to provide the telephone companies broader protection than previously existed, nowhere does this extensive history offer any hint that section 2894 or its amendments would operate other than to clarify and expand *preexisting immunity*. The fact that section 2894(a) expressly frames this class of immunity as a "defense" conclusively refutes Verizon's contention (Verizon Opp'n 15) that section 2891(d)(6) was intended to create

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[22] JRFJN Ex. D, ARUC Background Paper, Subpoena Clarification Legislation 1992-263 LRI, pp. 14-18 (emphases added).

[23] JRFJN Ex. F, Senate's Third Reading, SB 1450, 1992-263 LRI, p. 46 (enacting section 2894), (bill "expands the existing immunity so that a [company] need not make a judgment about the underlying lawfulness of [a] warrant, subpoena, or other process with which it is presented.").

[24] The first clause of section 2894 ("notwithstanding subdivision (e) of section 2891") likewise supports Plaintiffs' interpretation and refutes Defendants'. As noted in the Assembly Subcommittee on the Administration of Justice's Digest of the bill, the clause was added to "clearly cross-reference the existing immunity so that any potential ambiguity about 'dual' or 'competing' immunities is eliminated." JRFJN Ex. E, 1992-263 LRI, p. 41.

an element of the cause of action rather than likewise to provide immunity as a defense.[25]

Finally, section 2891(d) provides some eleven different exceptions to potential liability under the Consumer Protection Act. Plainly the Legislature did not intend, and section 2891 does not require, that every plaintiff plead and prove the absence of all those exceptions. *See Pulvermacher v. Los Angeles Co-Ordinating Comm. for Aid to Jewish Refugees*, 61 Cal. App. 2d 704, 708-710 (1943) (emphatically rejecting idea that plaintiff must "allege the nonexistence of the several exceptions, qualifications, and different combinations of circumstances, provided in [California's commitment statute] as conditions creating nonliability of petitioners." 61 Cal. App. 2d at 710); *see also Jaffe v. Stone*, 18 Cal. 2d 146, 158 (1941) (plaintiff need not negate "an exception to, or a qualification upon, these elements of his cause of action").[26]

b. Lack of Authorization Is Not an Element of Plaintiffs' Claim Under Article 1, Section 1 of the California Constitution.

Verizon (though not AT&T) next argues that, to satisfy the first two elements of a California constitutional privacy claim, Plaintiffs must show that Defendants' conduct was not authorized under federal law. Verizon Opp'n 17. Notably absent from Verizon's argument is any authority for the notion that negating statutory or judicial authorization for an invasion of privacy is a part of Plaintiffs' affirmative case. *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 35

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[25] Under California law, immunities are treated as affirmative defenses. *See, e.g.*, 2 Ann Taylor Schwing, *California Affirmative Defenses*, § 38-139, p. 823 (2006 Ed.) ("Immunity is properly asserted in the answer as an affirmative defense."); *id.* at § 38-142, p. 826 ("the burden of proof to establish an immunity from liability rests on the person who asserts an immunity); *id.*, § 38-1, p. 464 ("the existence of a duty and its breach are elements of the plaintiff's cause of action; the presence of an immunity is the defendant's affirmative defense"); *see also Inland Empire Health Plan v. Superior Court*, 108 Cal. App. 4th 588, 592 (2003) (governmental immunity is an affirmative defense); *Alicia T v. County of Los Angeles*, 222 Cal. App. 3d 869, 878 (1990) ("qualified . . . immunity is an affirmative defense that must be pleaded by a defendant official"); *Cornette v. Dep't. of Trans.*, 26 Cal. 4th 63, 66 (2001) (design immunity is an affirmative defense); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (qualified immunity is an affirmative defense under federal law); *In re Stock Exch. Options Trading Antitrust Litig.*, 317 F.3d 134, 150 (2d Cir. 2003) (implied antitrust immunity is affirmative defense).

[26] *See also* 4 Witkin, California Procedure 4th (1997), Pleading, § 381, "Rule Against Negativing Defenses" (citing *Pulvermacher*). *Cf. People v. George*, 30 Cal. App. 4th 262, 275 (1994) (citations omitted) ('where a [criminal] statue first defines an offense in unconditional terms and then specifies an exception to its operation, the exception is an affirmative defense to be raised and proved by the defendant"); *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, 123 Cal. App. 4th 714, 726 (1st Dist. 2004) (citations and internal quotation marks omitted) (applying this criminal law principle to civil case).

(1994), relied upon by Verizon, makes clear that any purported justification for the alleged privacy invasion (*i.e.*, a "competing" or "countervailing" interest) must be pleaded and proved by defendant as an *affirmative defense*. *Id*. at 40; *accord Tom v. City and County of San Francisco*, 120 Cal. App. 4th 674, 679, 688 (2004) (identifying countervailing interests as affirmative defenses); *TBG Insurance Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443, 450 & n.5 (2002) (plaintiff's consent to the intrusion can be a "complete defense").

Indeed, *Hill* expressly identifies legally authorized governmental conduct as one such competing interest that may be presented as an affirmative defense. 7 Cal. 4th at 38 ("*legally authorized* and socially beneficial activities of *government* and private entities" may constitute a competing interest, and thus, a defense) (emphases added). Yet *Hill* makes clear that only *after* such competing interest is raised as a defense will the court reconcile that interest against the plaintiff's claimed privacy invasion. *Id*. at 37.[27] Thus, neither *Hill* nor any other authority supports an argument that the lack of a competing interest, such as legal authorization for the challenged privacy intrusion, is an embedded element of a California constitutional privacy claim.

2. Determining Whether Federal Legal Process Might Exist Does Not Require Interpretation of a Substantial, Disputed Question of Federal Law.

Defendants' *Grable* arguments fail for a second, independent reason: Defendants have not proven that determining whether legal authorization exists would require "construction" of any federal statute. Plaintiffs have raised no issue as to the scope, meaning, or legality of any of

[27] Verizon reverses the *Hill* analysis in arguing that a plaintiff cannot prove a "legally protected privacy interest" or a "reasonable expectation of privacy" if the invasion were ultimately to be held lawful. As *Hill* makes clear, the test for a "legally protected" interest, or a "reasonable expectation," is *not* whether the invasion will, after the final balancing against justifications, be held justified. Rather those threshold elements involve only whether the information at issue is such that "social norms recognize the need to maximize individual control over [information's] dissemination and use to prevent unjustified embarrassment or indignity." *Hill*, 7 Cal. 4th at 35.

the federal statutes Defendants identify as potentially authorizing their conduct.[28] Rather, Plaintiffs have alleged Defendants received no authorization *at all*, from *any* governmental entity. Whether Defendants actually did receive any such authorization is a factual dispute, akin to that in *Empire*. *See* Pl.s' Br. 18-19. This case is, in the words of the *Empire* Court, "poles apart" from the purely *legal* dispute in *Grable*, where resolution of the plaintiff's quiet title claim necessarily turned on the construction of a federal statutory provision—namely, whether 26 U.S.C. section 6335(a) required notice of seizure by personal service or by mail. As *Empire* demonstrates, had the *Grable* plaintiff alleged receipt of *no notice at all*, there would have been no need to construe section 6335(a) and no embedded federal question. *See Empire*, 1265 S. Ct. at 2136-37. That is precisely the case here.

By Defendants' rationale, any time a federal law must be applied to a state law claim, the second element of *Grable* would be met, since no federal statutory provisions can be applied "without first giving those provisions some meaning." Verizon Opp'n 16. This argument proves far too much. Virtually every case involves a dispute over applying the operative law to the relevant facts. As Verizon would have it, if that law is federal, the case can be removed.

That position is an invitation to error. It flies in the face of *Empire*, *Grable*, and their forerunners, all of which require that the dispute turn on the *interpretation*, not the mere application of federal law. *Empire*, 126 S. Ct. at 2137; *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2368 (2005); *Franchise Tax Bd.*, 463 U.S. at 9 (dispute must "necessarily turn[] on some *construction* of federal law") (emphasis added). It would also flout the well-settled principle that state courts are fully competent to apply federal law (Pl.'s Br. 9) and the bedrock principle that federal courts' limited jurisdiction may not be extended beyond the limited grant given by Congress in 28 U.S.C. section 1331. *Patrickson v. Dole Food Co.*, 251

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[28] Defendants cite only one federal statute that purportedly must be "interpreted" to resolve Plaintiffs' claims. 18 U.S.C. section 2702(c)(4) provides for disclosure "if the provider *reasonably believes* that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information." *See* Verizon Opp'n 17-18. Whether Defendants "reasonably believed" that such an emergency exists is exactly the sort of "fact-bound and situation-specific" inquiry that *Empire* held does *not* constitute a "legal interpretation" and thus does not create federal jurisdiction. 126 S. Ct. at 2136-37. It does not require the interpretation of federal law, only its application.

F.3d 795, 802 (9th Cir. 2001), *aff'd*, 538 U.S. 468 (2003); *see also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983).

B. Even if Properly Asserted by the Government, the State Secrets Privilege Would Not Confer Jurisdiction.

Defendants do not seriously dispute that the state secrets privilege is not an affirmative element of Plaintiffs' claims. Instead, they claim the government's potential assertion of the state secrets privilege could give rise to federal question jurisdiction because the determination of whether the privilege applies implicates substantial, disputed federal issues. *See* Verizon Opp'n 18-23; AT&T Opp'n 17-21. This argument is based on the same faulty reading of *Grable* discussed above. It brushes over *Grable's* explicit requirement that the federal question be an affirmative element of Plaintiffs' claims. As noted in Plaintiffs' opening brief (without rejoinder by Defendants), *Grable* did not dispense with the "well pleaded complaint rule" (Pl.'s Br. 17) nor render federal defenses or privileges the basis for "arising under" jurisdiction.[29]

No matter how many times or how forcefully Defendants repeat the words "substantial," "disputed," and "federal," they cannot jam these actions into that "slim category" of cases that may be removed because they *necessarily* require resolution of a substantial question of federal law. *See Empire*, 126 S. Ct. at 2137; *Grable*, 125 S. Ct. at 2368. Other than their tortured misinterpretation of *Grable*, Defendants offer no authority for their claim that the assertion (much less the potential assertion) of the state secrets privilege confers removal jurisdiction. Nor have they cited any authority refuting that the privilege can be fully adjudicated in state court.

Defendants' argument that the state secrets doctrine may constitute a total bar, rather than a privilege, is equally flawed. Aside from the principle that a federal defense, like a federal privilege, does not create removal jurisdiction, this Court has already recognized in *Hepting* that the state secrets privilege merely operates as an evidentiary limit to discovery, and does not

[29] Verlinden *supra*, makes clear that statutory "arising under" jurisdiction is *not* as broad as Article III "arising under" jurisdiction. *Verlinden*, 461 U.S. at 494, 495, 497-498 (a conclusion that a grant of jurisdiction could be consistent with the Constitution "does not end the case" because an action "must not only satisfy Article III but must also be supported by a statutory grant of subject matter jurisdiction").

mandate immediate dismissal of such claims. *Hepting*, WL at *17, LEXIS at *53 (holding that "the very subject matter of this action is not a 'secret' for purposes of the state secrets privilege"). This Court expressed its "hesitan[ce] to conclude that the existence or non-existence of the call records program necessarily constitutes a state secret," even though the record in *Hepting* revealed less reliable publicly available information about that program than about the surveillance of communication *content*. *Id*. WL at *20, LEXIS at *60. Significantly, the record in this action makes it even more certain that the state secrets doctrine cannot constitute a bar here.

In *Hepting*, the primary evidence before the Court of the call records program consisted of media reports, which the Court held to be insufficiently reliable. *Id.* WL at *14, LEXIS at *41, *59; *see also id.* WL at *13, LEXIS at *40 ("in determining whether a factual statement is a secret, the court considers only public admissions or denials by the government, AT&T and other telecommunications companies . . . .") By contrast, Plaintiffs here have submitted admissions from the government in the form of public appearances by two United States Senators, who indisputably had official knowledge of the call records program, and confirmed it in their efforts to defend the Bush Administration:

- Senator Christopher "Kit" Bond (R-MO), who has been thoroughly briefed on warrantless surveillance operations as a member of the Senate Intelligence Committee, explained on PBS that ***"[t]he president's program uses information collected from phone companies . . . what telephone number called what other telephone number.***" Plaintiffs' Requests for Judicial Notice in Support of Motions for Remand ("RFJN"), Exh. F. at 5 (emphasis added).

- Senator Pat Roberts (R-KS), the chair of the Senate Intelligence Committee, described the program on NPR. ***When asked 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." RFJN, Exh. D at 2. (emphasis added.)

These admissions by knowledgeable government officials provide exactly the sort of credible

information that negates any pretense that the existence of the call program is a "state secret."[30]

Verizon's public, but artfully phrased, "denials" of participation in the call records program further demonstrate the inapplicability of the state secrets privilege. JRFJN Exs. I and J. If Verizon's declarations of non-participation are truthful, its nonparticipation is certainly no longer secret. Verizon can support its defense by a simple response to narrow requests for admissions and interrogatories. *Cf. Hepting*, WL at *19, LEXIS at *59 ("if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements").

For all these reasons, the existence of the state secrets privilege does not confer removal jurisdiction under *Grable* or any other authority.

C. The *Totten* Doctrine Does Not Confer Jurisdiction and in Any Event, Is Inapplicable to These Cases.

Defendants also mistakenly assert that potential application of the *Totten* bar triggers removal jurisdiction.[31] While a court is sometimes *permitted* to consider the *Totten* rule as a threshold question prior to addressing subject matter jurisdiction (*Tenet v. Doe*, 544 U.S. 1, 6 & n.4 (2005)), it certainly is not *required* to do so. *Id*. (noting that application of the *Totten* rule "represents the sort of 'threshold question' we have recognized *may* be resolved before addressing jurisdiction") (emphasis added). This Court therefore is free to consider jurisdictional issues first, and should do so here. After remand the state court would (with the guidance of this Court's ruling in *Hepting*) determine the applicability of *Totten* to these actions.

Alternatively, if this Court chooses to consider the *Totten* issue first, it should apply its own precedent in *Hepting* and hold that *Totten* simply does not bar these actions. As in *Hepting*,

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[30] As recognized both by this Court in *Hepting* and by Judge Kennelly in the *Terkel* case, "public admissions by the government about the specific activity at issue ought to be sufficient to overcome a later assertion of the state secrets privilege." *See* WL at *19-11, LEXIS at *29-34, *43; *Terkel v. AT&T Corp.*, No. 06 C 2387, 2006 WL 2088202, at *13, 2006 U.S. Dist. LEXIS 50812, at *42 (N.D. Ill Jul. 25, 2006). *See also Hepting*, WL at *29-34, LEXIS at *43. The *Terkel* court also did not have these Senator's public statements before it.

[31] Plaintiffs find it particularly odd that Verizon would assert *Totten* (a doctrine premised on the existence of a secret espionage relationship with the government) since Verizon has publicly denied that it entered into an arrangement with the federal government concerning the provision of its customers' calling records. *Hepting*, WL at *11, LEXIS at *34.

Plaintiffs are not parties to any alleged covert arrangement with the government, and reliable public information evidences Defendants' practice of disclosing calling records to the NSA. *See Hepting*, WL at *15-16, LEXIS at *44-49; Pl.'s Br. 4-6. Judge Kennelly reached a similar conclusion in *Terkel*:

> Disclosing the mere fact that a telecommunications provider is providing its customer records to the government, however, is not a state secret without some explanation about why disclosures regarding such relationship would harm national security. Put another way . . . the Court can hypothesize numerous situations in which confirming or denying the disclosure of telephone records to the government would not threaten national security and would clearly reveal wholesale violations of the plaintiffs' statutory rights.

Terkel, WL at *8, LEXIS at *25 (rejecting *Totten* bar in a challenge to AT&T's disclosure of call records).

In all events, should this Court conclude that it is appropriate to reach the threshold issue presented by *Totten*, doing so would still not *confer* federal question jurisdiction. A potential *Totten* issue would not create federal subject matter jurisdiction under *Grable* any more than any other federal issue that is not an affirmative element necessarily raised by the elements of Plaintiffs' claims. As the other examples of "threshold questions" cited in *Tenet* readily demonstrate, deciding a federal issue of justiciability does not supplant the need independently to determine subject matter jurisdiction. *See Tenet*, 544 U.S. at 6 & n.4 (describing cases in which personal jurisdiction, standing, or abstention were decided as threshold issues). Indeed, Defendants have cited no authority for the proposition that deciding the *Totten* issue could confer jurisdiction, and Plaintiffs are unaware of any.

Accordingly, whether or not this Court decides to determine the *Totten* issue as a threshold matter at this time, remand of this action is nonetheless required.

IV. DEFENDANTS HAVE NOT SHOWN THEIR ACTIONS WERE DIRECTLY CONTROLLED BY A FEDERAL OFFICER OR AGENCY.

"Whether a defendant is 'acting under' the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." *Watson v. Philip Morris Coms.*, 420 F.3d 852, 856-57 (8th Cir. 2005), *Pet. for Cert. Filed*, 74 U.S.L.W. 3588 (Apr. 07, 2006) (No. 05-1284).

Federal control must be "direct and detailed" to support removal under 28 U.S.C. section 1442. *Fung v. Abex Corp*., 816 F. Supp. 569, 572 (N.D. Cal. 1992).

While not directly disputing this standard, Defendants have not begun to make the required showing. Verizon relies on allegations in Plaintiffs' complaint, but those allegations do not assert detailed direction and control by the government. *See e.g.*, *Riordan* Comp. ¶¶ 1, 14, 19.[32] AT&T asks the Court simply to *assume* the degree of control that section 1442 requires the removing party to prove. AT&T Opp'n 25. The complete absence on this record of any proof of NSA control over Defendants' conduct precludes removal.[33]

Nor have Defendants shown that their actions were compelled by the government. That the NSA might have *requested* Plaintiffs' private information does not amount to compulsion to turn it over. Defendants' assertion that a "volunteer" may be entitled to removal merely for having volunteered is insupportable. It was the existence of a court-issued wiretap order that sustained removal jurisdiction in *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 489 (1st Cir. 1989). And although dictum in *Watson* states that a volunteer "can" be acting under a federal officer, the *Watson* court specifically found that the defendant in that case had been "coerced" and "compelled" to enter an agreement that then provided the government "comprehensive and detailed control." 420 F.3d at 859-861.

Moreover, Defendants conflate the distinction between the voluntary undertaking of a relationship with the government and subsequent compulsory performance under government control. In *Watson* and the other cited cases, it was the government's detailed control over defendants' *performance* of the contracts that compelled the defendants to produce the products as they did, and that warranted removal when those products were challenged. *See Fung*, 816 F. Supp. at 572-73; *Winters*, 149 F.3d at 399. Here, it is Defendants' initial, voluntary, and

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[32] Paragraph 14 of Plaintiffs' Complaint in the *Riordan* action, cited by Verizon (*see* Verizon Opp'n 24), does *not* allege that *Verizon* assisted the NSA in searching for patterns of social interaction. Plaintiffs allege only that Verizon provided the records and that it was the NSA that reportedly conducted the analysis.

[33] Defendants' failure to make the necessary showing here stands in stark contrast to the extensive factual records justifying removal in cases such as *Watson*, 420 F.3d at 855, 858; *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 399-400 (5th Cir. 1998); *Pack v. AC&S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993); and *Fung*, 816 F. Supp. at 572-73.

unlawful decision to turn over Plaintiffs' records that is at issue—a decision that was neither compelled by the government nor made under its detailed and specific control. By analogy, a Vista "volunteer"—paid, supervised, and controlled by government officers as mandated by federal statute—is acting under control of a government agent when aiding migrant workers. *See Oregon v. Cameron*, 290 F. Supp. 36, 37-38 (D. Or. 1968). The same worker could not maintain he was acting under the control of the government in defense of a claim that his choice to volunteer for Vista breached a pre-existing agreement to work for another employer. Likewise here, there is no nexus between Defendants' voluntary act of turning over information to the government, and any (unproven) direction the government might have provided as to how it wished to receive the information voluntarily provided. *See Watson*, 420 F.3d at 861 (requiring "nexus" and "causal relationship" whereby the "acts that form the basis for the . . . suit were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations") (citations omitted).

The bare allegations of the removal petition fail to establish the necessary compulsion, direction, or control which defendants bear the burden of proving. Their opposition entirely fails to augment those insufficient allegations. Removal under section 1442 was improper.

CONCLUSION

For the foregoing reasons, Plaintiffs' motions for remand should be granted.

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Respectfully,

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