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

18  
 19 IN RE:

MDL No. 06-1791 VRW

20 NATIONAL SECURITY AGENCY  
 21 TELECOMMUNICATIONS RECORDS  
 LITIGATION,

**PLAINTIFFS' JOINT OPPOSITION TO  
 VERIZON'S MOTION TO DISMISS THE  
 CHULSKY, RIORDAN, AND BREADY  
 COMPLAINTS**

22 This Document Relates To:

23 06-3574, 06-6313, and 06-6570.  
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**ISSUES TO BE DECIDED**

1  
2 1. Whether state laws regulating public utilities and protecting privacy and consumer  
3 records are preempted where there is no evidence of Congressional intent to preempt by federal  
4 law, and the state laws neither implicate foreign affairs nor directly regulate the federal  
5 government.

6 2. Whether the *Chulsky* Plaintiffs’ misrepresentation and fraud claims are subject to  
7 dismissal under Rule 9(b) of the Federal Rules of Civil Procedure, where:

8 (A) claims for misrepresentation are not subject to Rule 9(b);

9 (B) the *Chulsky* Plaintiffs’ allegations that Verizon falsely and knowingly  
10 misrepresented that it would not disclose communications and call records without consent or  
11 court order give Verizon ample notice of its misconduct; and

12 (C) in any event, leave to amend the Complaint should be freely granted  
13 pursuant to Rule 15 of the Federal Rules of Civil Procedure.

14 3. Whether *Chulsky’s* factual allegations supporting all elements of their breach-of-  
15 contract claims satisfy notice pleading requirements under Rule 8 of the Federal Rules of Civil  
16 Procedure, and if not, whether leave to amend should be freely given.

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**INTRODUCTION**

1  
2 The *Riordan*, *Chulsky*, and *Bready* Plaintiffs seek to enforce state laws that are fully  
3 consistent with, and complementary to, Congressional statutes that expressly contemplate  
4 concurrent state regulation of electronic surveillance. Indeed, while Congress *could have*, it has  
5 *not* acted to preempt traditional state regulation of public utilities and privacy rights of their  
6 customers. Application of the asserted state laws to Verizon does not regulate or restrict the  
7 *federal government*; neither does it prohibit Verizon from assisting or contracting to assist the  
8 federal government. These state laws have no relation to foreign policy. And, as this Court has  
9 already concluded, the California laws do not conflict with any federal laws—statutory, common  
10 law, or otherwise. The same is true of the Maryland and New Jersey laws: compliance with  
11 federal authority is a defense to all. Rather, the state laws asserted simply provide additional  
12 remedies where a telecommunications carrier has provided access to customers’ private call  
13 records and electronic communications, without any federal or state authorization.

14 In this context, Verizon’s Motion to Dismiss finds no support in any viable preemption  
15 doctrine. Abandoning traditional preemption analysis, Verizon instead continues its “repeated  
16 invocation of the ‘sweeping authority of Congress and the Executive’ to protect national security”  
17 that this Court rejected in the motion to remand—now cloaked under a new rubric of  
18 “constitutional field preemption.” *See In re NSA Telcoms. Records Litig.*, MDL No. 06-1791,  
19 2007 U.S. Dist. LEXIS 3786, WL 163106, at \*2 (N.D. Cal. Jan. 18, 2007) (hereinafter “*Remand*  
20 *Order*,” with citations to Westlaw pagination). This argument for preemption—by the mere *grant*  
21 in the Constitution of Congressional authority to provide for national defense—finds no direct  
22 support in the case law. Instead, Verizon relies principally on cases that did not address  
23 preemption of a state law or found preemption of laws expressly attempting to regulate foreign  
24 affairs, which have no application here. This Court already considered and rejected most of those  
25 cases when it found that preemption did not provide a basis for federal jurisdiction in the *Riordan*  
26 case. Finding the state claims preempted—in the absence of Congressional directive—would  
27 require a feat of judicial activism no different than creating a new rule of federal common law  
28 (which this Court already rejected as unwarranted).

1 In the alternative, Verizon makes equally unavailing arguments that the claims are  
 2 preempted because Plaintiffs seek to directly regulate the federal government. Again, Verizon  
 3 cites cases that are not remotely analogous to the instant setting. Accordingly, Verizon's Motion  
 4 to Dismiss the *Riordan*, *Chulsky*, and *Bready* complaints must be denied; they are not preempted  
 5 by the mere delegation of authority to Congress.

6 Verizon also seeks dismissal of three of the nine *Chulsky* claims for failing to satisfy  
 7 particular pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Yet the  
 8 first of those claims is for misrepresentation, not "fraud or mistake." Verizon ignores authority in  
 9 the Ninth and Third Circuits (*Chulsky's* trial forum) that a misrepresentation claim need not be  
 10 pled with particularity under Rule 9(b). Moreover, to the extent that Rule 9(b) applies, the  
 11 *Chulsky* Complaint alleges specific instances in which Verizon falsely assured customers that it  
 12 would not disclose their communications and records without consent or court order.

13 Verizon also seeks dismissal of two additional *Chulsky* claims, for breach-of-contract and  
 14 violations of the Truth-in-Consumer Contract, Warranty and Notice Act. Verizon incorrectly  
 15 suggests that Rule 8 of the Federal Rules of Civil Procedure requires dismissal unless the  
 16 "specific customer agreement is attached, quoted, or [] cited" to in the Complaint. Nonsense.  
 17 The *Chulsky* Plaintiffs give Verizon fair notice of those causes of action by alleging the existence  
 18 of the subscriber agreements that were breached. In any event, should the Court find that more  
 19 specificity is necessary for any of the *Chulsky* claims, leave to amend should be freely given.

### 20 **FACTUAL AND PROCEDURAL BACKGROUND**

21 Defendants Verizon Communications Inc., and Verizon Maryland Inc. (collectively  
 22 "Verizon") seek to dismiss, on preemption and pleading grounds, three actions raising claims  
 23 solely under state law: *Riordan v. Verizon Commc'ns Inc.*, 06-3574, *Bready v. Verizon Maryland*  
 24 *Inc.*, No. 06-6313, and *Chulsky v. Cellco Partnership & Verizon Commc'ns Inc.*, No. 06-6570.  
 25 After being removed from state court and consolidated in this multidistrict proceeding, plaintiffs  
 26 in all three cases filed motions to remand.

27 While this Court denied remand in *Riordan*, it also rejected Verizon's argument that  
 28 federal jurisdiction could be premised on purported complete preemption by various federal

1 statutes or the federal common law. *See Remand Order* at \*2-5. Indeed, the Court specifically  
 2 considered, and rejected, Verizon’s “conten[tion] that federal law governing national securities  
 3 matters ‘leaves no room for plaintiffs’ state-law privacy claims.’” *Id.* at \*2. Instead, the Court  
 4 found federal jurisdiction on other grounds.

5 By the current motion, Verizon seeks to dismiss each of the *Riordan*, *Bready*, and *Chulsky*  
 6 complaints on preemption grounds and to dismiss particular *Chulsky* claims sounding in fraud and  
 7 breach of contract based on alleged pleading defects. Mem. in Supp. of Verizon’s Mot. to  
 8 Dismiss the *Chulsky*, *Riordan*, and *Bready* Complaints, Doc. No. 271 (M:06-cv-01791-VRW)  
 9 (hereinafter “*Ver. Mot.*”). Other motions by Verizon and the U.S. government are currently  
 10 pending before the Court and seek dismissal of Plaintiffs’ claims against Verizon, its affiliates  
 11 and subsidiary MCI, on grounds of personal jurisdiction and state secrets—issues that are not  
 12 addressed in this brief. Hearing on all of these motions is August 30, 2007. Because this Court  
 13 will consider similar preemption issues at the June 21, 2007 hearing on the State Officials  
 14 Actions, Plaintiffs submit this brief for the Court’s consideration in advance of that hearing.<sup>1</sup>

15 **A. The *Riordan* Complaint.**

16 The *Riordan* Plaintiffs commenced their action on May 26, 2006, in the wake of  
 17 widespread publicity about Verizon’s and MCI’s turnover of vast databases of private customer  
 18 information. In *Riordan*, which is not a class action, Plaintiffs are residential customers of  
 19 Verizon and its MCI subsidiary in California. *Riordan* Compl. ¶¶ 5-11. They include the drafter  
 20 of California’s Consumer Privacy Act, a psychiatrist, business people, two criminal defense  
 21 attorneys, a civil rights attorney and the members of the three ACLU affiliates in California.  
 22 These Plaintiffs challenge Verizon’s (and its subsidiary, MCI’s) voluntary turnover to the  
 23 National Security Agency (“NSA”) of millions of residential telephone customer calling records  
 24 and other data without any legal process (such as a compulsion of a warrant, court order,  
 25 subpoena, or other legal authority), and without their consent. *Id.* ¶¶ 2, 9, 12, 18.

26 The customer calling records Verizon turned over reveal the telephone numbers of those

27 \_\_\_\_\_  
 28 <sup>1</sup> Plaintiffs will file separate briefs responding to other motions to dismiss by Verizon and the  
 Government when they are due, on June 22, 2007.

1 making and receiving millions of telephone calls, as well as the time, date and duration of each  
 2 call. The California Legislature recognized the importance of utilities' maintaining the  
 3 confidentiality of this information when it enacted the Customer Privacy Act, which included  
 4 Cal. Pub. Util. Code § 2891. The Legislature declared that "the protection of this right to privacy  
 5 [of telephone communications] is of paramount state concern, and to this end, has enacted this  
 6 act." Cal. Pub. Util. Code § 2891, Historical & Statutory Notes, § 1 of Stats. 1986, c. 821.

7 The *Riordan* Plaintiffs assert two causes of action under California law: violation of  
 8 Section 2891, and violation of Plaintiffs' rights of privacy guaranteed under Article I, section 1 of  
 9 the California Constitution. They seek declaratory and injunctive relief prohibiting further  
 10 disclosures of telephone customer information without legal process. They do not seek damages.

11 **B. The *Bready* Complaint.**

12 The *Bready* Plaintiffs are six individuals representing a class of subscribers to Verizon's  
 13 services in Maryland. The *Bready* Plaintiffs allege that defendant Verizon Maryland, Inc.  
 14 monitored and intercepted, either directly or through its parent company, their telephone, internet  
 15 communications, and/or calling records for "data mining," a process used to analyze data for  
 16 patterns or connections among disparate records. *See Bready Compl.* ¶¶ 35-79. Their complaint,  
 17 filed in Maryland Circuit Court on July 21, 2006, seeks damages and injunctive relief.

18 The *Bready* Plaintiffs assert violations of three Maryland statutes based on Verizon's  
 19 interception and monitoring: Md. Code Ann., CTS. & JUD. PROC., § 10-402(a) ("Wiretap &  
 20 Electronic Surveillance Act"), § 10-4A-04(c)(2)(ii) ("Stored Wire And Electronic  
 21 Communications & Transactional Records Access"), and § 10-4B-02(a) ("Pen Registers and Trap  
 22 and Trace Devices") (West 2006).

23 **C. The *Chulsky* Complaint.**

24 The *Chulsky* Plaintiffs and class members subscribe to and have used Verizon's long  
 25 distance, regional, and/or residential telecommunications services in New Jersey. *Id.* ¶¶ 4-10, 29,  
 26 45. The *Chulsky* Plaintiffs allege that Verizon "knowingly, willfully, and voluntarily provided  
 27 confidential, private, and protected information," *Chulsky Am. Compl.* ¶ 97, specifically, its  
 28 customer "communications" and "customer records," to the Government. *See Id.* ¶ 23, 31-34, 38-

1 41. Defendants thereby violated the *Chulsky* Plaintiffs' rights under the New Jersey constitution,  
 2 statutes, and common law, *id.* ¶¶ 65-132 (Counts I – IX), including the New Jersey Wiretap Act,  
 3 N.J. Stat. Ann. § 2A:156A-1 *et seq.* (West 2007).

4 The *Chulsky* Plaintiffs also have claims for malicious misrepresentation (Count IV), and  
 5 violations of the N.J. Consumer Fraud Act (Count VI) and N.J. Deceptive Business Practices Act  
 6 (Count VIII). These claims are supported by allegations detailing how Defendants, through  
 7 “subscriber agreements” and “promotional literature and/or written notices . . . represented that  
 8 the personal, private, and confidential records and information of the Plaintiffs . . . would be  
 9 protected from disclosure to and use by governmental authorities without appropriate consent  
 10 and/or authorization and/or legal authority while at all relevant times the Defendants knew such  
 11 representations to be false.” *Chulsky* Am. Compl. at ¶ 97. *See also id.* ¶ 43, 47, 125.

12 The *Chulsky* Plaintiffs also allege claims for breach of contract (Count III) and Violations  
 13 of the Truth-in-Consumer Contract, Warrant and Notice Act (Count VII). The alleged contracts  
 14 are identified throughout the complaint as the *Chulsky* Plaintiffs' subscriber agreements, *see, e.g.,*  
 15 *Chulsky* Am. Compl. ¶ 43, 97, 125, under which “Defendants agreed to provide for a subscription  
 16 fee, and Plaintiffs and class members agreed to purchase from the Defendants, various  
 17 telecommunications” services. *Id.* ¶ 91, 117-18. The claims also allege the pertinent terms of  
 18 those contracts, whereby Defendants “expressly promised to protect the privacy and  
 19 confidentiality of its customers' information, identity, records, subscription, use details, and  
 20 communications.” *Id.* ¶ 92. Defendants breached those agreements by “knowingly, willfully, and  
 21 voluntarily provid[ing] confidential, private, and protected information” (*i.e.*, “communications”  
 22 and “customer records”) to the Government without consent or court order. *See id.* ¶¶ 23, 31-34,  
 23 38-43, 97. The *Chulsky* Plaintiffs seek damages for their contract claims. *Id.* ¶¶ 94, 123.

24 Although they could have, none of the *Riordan*, *Chulsky* or *Bready* Plaintiffs are pursuing  
 25 relief under federal law. Nor have they asserted any claims against the federal government or its  
 26 representatives. Nevertheless, they do not dispute that if Verizon had turned over the call records  
 27 in a good faith response to legal process (which each alleges is *not* the case) that would provide a  
 28 defense to their state law claims. Thus, if this Court grants any of Plaintiffs' requests for

1 declaratory or injunctive relief, it would have no impact on the NSA's ability to conduct lawful  
2 surveillance of telephone and internet communications.

### 3 ARGUMENT

4 Although the federal government is supreme when it affirmatively acts, exercise of such  
5 federal supremacy is not lightly to be presumed. *See N.Y. State Dep't of Soc. Servs. v. Dublino*,  
6 413 U.S. 405, 413 (1973). Indeed, "because the States are independent sovereigns in our federal  
7 system, we have long presumed the Congress does not cavalierly pre-empt state-law causes of  
8 action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). And, where Congress is alleged to  
9 have preempted areas traditionally occupied by the states, "we start with the assumption that the  
10 historic police powers of the States were not to be superseded by the Federal Act unless that was  
11 the clear and manifest purpose of Congress." *Id.* (internal quotations omitted). The state laws  
12 challenged here are entitled to such presumption, because "[t]he regulation of utilities is one of  
13 the most important of the functions traditionally associated with the police power of the States."  
14 *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 365 (1989) (internal  
15 citation omitted). *See also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 375, 381 n.8 (1999)  
16 (states possess wide latitude to regulate intrastate telecommunications matters).

17 Well settled preemption jurisprudence establishes three circumstances in which a state law  
18 may be preempted: (i) express preemption, where Congress, through "explicit statutory language"  
19 has preempted state regulation; (ii) field preemption, where Congress intended the federal  
20 government to occupy the field exclusively; or (iii) conflict preemption, where a particular state  
21 law actually conflicts with federal law. *See English v. General Elec. Co.*, 496 U.S. 72, 78-79  
22 (1990). "In considering whether any of these three categories of preemption apply, however, the  
23 purpose of Congress is the ultimate touchstone of pre-emption analysis." *Kroske v. US Bank*  
24 *Corp.*, 432 F.3d 976, 981 (9th Cir. 2005), *as amended at Kroske v. US Bank Corp.*, No. 04-35187,  
25 2006 U.S. App. LEXIS 3367, 2006 WL 319025 (9th Cir. Feb. 13, 2006) (citations omitted).

26 Verizon hardly takes the effort to argue that any of these three traditional bases for  
27 preemption applies. They do not, principally for reasons already set forth by this Court when it  
28 found no complete preemption in the Remand Order. *See Part I(A)-(C)*.

1 Similarly, the Remand Order rejected Verizon's main preemption argument here, holding  
2 that, in the absence of express Congressional directives on point, no federal common law  
3 preempts Plaintiffs' state law claims. *Remand Order* at \*4; *see also Boyle v. United Techs. Corp.*,  
4 487 U.S. 500 (1988). Verizon attempts now to sketch out an unprecedented theory it labels  
5 "constitutional field preemption." But the cases upon which Verizon relies are the same  
6 applications of the federal common law of foreign affairs that this Court previously considered,  
7 and rejected, as a source of preemption. *See* Part II(A). The foreign affairs preemption cases  
8 cannot bear on Plaintiffs' state law claims, which involve purely domestic companies and conduct  
9 and in no way seek to intrude on foreign affairs or international diplomacy. *See* Part II(B). Nor  
10 do the foreign affairs preemption cases support creation of a new rule of federal common law  
11 relating to national security where "no conflict exists between plaintiffs' California privacy  
12 claims and any uniquely federal interest." *Remand Order* at \*4; *see* Part II(C). As the Supreme  
13 Court has never recognized a federal common law of "national security" or "electronic  
14 surveillance," Verizon could prevail only if this Court decides to act affirmatively, where  
15 Congress has not, and declare an overriding federal law that displaces generally applicable state  
16 utility and privacy laws. No existing authority supports such a reach. *See* Part II(D).

17 These state laws also do not run afoul of the Supremacy Clause directly, because none  
18 "regulates the Government directly or discriminates against it." *North Dakota v. United States*,  
19 495 U.S. 423, 434 (1990). Each of the laws asserted by the *Riordan*, *Chulsky*, and *Bready*  
20 Plaintiffs are laws of general applicability. They in no way regulate the government or disfavor  
21 Verizon based on its relationship with the federal government. *See* Part III. Accordingly, they  
22 cannot be preempted on any grounds.

23 Verizon's challenges to the *Chulsky* Plaintiffs' misrepresentation, fraud, and contract-  
24 based claims are also flawed. First, the *Chulsky* Plaintiffs' misrepresentation claim (Count IV) is  
25 not even subject to Rule 9(b) of the Federal Rules of Civil Procedure "[b]ecause a claim of  
26 misrepresentation is distinct from a claim of fraud under state law." *In re Cendant Corp.*, 190  
27 F.R.D. 331, 337 (D.N.J. 1999) (citation omitted). Further, while Rule 9(b) does apply to  
28 allegations supporting claims under the N.J. Consumer Fraud Act and Deceptive Business



1 Practices Act (Counts VI and VIII) the Complaint's numerous allegations of fraud are specific  
 2 enough to give a defendant notice of the alleged misconduct so that it can defend against them.  
 3 Accordingly, each of the misconduct and fraud-based claims satisfies Rule 9(b). *See* Part IV.

4 Verizon's final effort to chip away at the *Chulsky* complaint's contract-based claims  
 5 (Counts III and VII) is also based on an erroneous conception of the law. It is irrelevant whether  
 6 a "specific customer agreement is attached, quoted, or even cited" to in the Complaint. *Cf. Ver.*  
 7 *Mot.* at 15. These claims satisfy federal notice pleading requirements, which require only that the  
 8 *Chulsky* Plaintiffs plead breach of contract "according to its effect." The *Chulsky* plaintiffs have  
 9 pleaded facts supporting all elements of their breach-of-contract claims, *Chulsky* Am. Compl. ¶¶  
 10 91, 92, 94, 97, 123, and accordingly, under Rule 8, their contract claims stand. *See* Part V.

11 **I. NO FEDERAL LAW PREEMPTS PLAINTIFFS' STATE LAW CLAIMS.**

12 If the bulk of Verizon's preemption argument rings familiar, that is because it is only a re-  
 13 hashing of arguments Verizon made in opposition to remand. *See Riordan et al. v. Verizon*  
 14 *Commc'ns, Inc.*, Def.'s Opp'n to Pls.' Mot. to Remand, Doc. No. 29 (Case No. 06-3574) at 7-9  
 15 ("*Ver. Opp'n to Remand*") (presenting the same cases). Once again, Verizon misses the mark.

16 In the Remand Order, this Court ruled:

17 Defendants contend that federal law governing national security matters "leaves no  
 18 room for plaintiffs' state-law privacy claims." Safeguarding national security is  
 19 said to fall squarely within the federal government's "supreme sphere of action."  
 20 ("The Founders recognized that among the 'principal purposes to be answered by  
 21 [the] union' are '[t]he common defence of the members' and 'the preservation of  
 22 the public peace, as well against internal convulsions as external attacks.'") But  
 23 defendants' repeated invocation of the "sweeping authority of Congress and the  
 24 Executive" to protect national security misses the mark. Under the doctrine of  
 25 complete preemption, the question is not whether Congressional authority exists, it  
 26 is instead whether that authority has been exercised to its fullest extent.

27 *Remand Order* at \*2 (internal citations omitted). This Court proceeded to analyze the specific  
 28 statutory enactments and purported conflicts with federal law to determine whether complete  
 preemption existed. *Id.* at \*2-5. Though the question is now one of ordinary, not complete,  
 preemption, the appropriate question is again not whether federal authority *exists*, but whether  
 that authority has been exercised with intent to displace the challenged state law of several  
 application. *See, e.g., Boyle*, 487 U.S. at 504 ("In most fields of activity, to be sure, this Court

1 has refused to find federal pre-emption of state law in the absence of either a clear statutory  
2 prescription, or a direct conflict between federal and state law.”).

3 **A. Federal Statutes Do Not Expressly Preempt Plaintiffs’ Claims.**

4 In the Remand Order, this Court correctly rejected Verizon’s argument for express  
5 preemption under the Stored Communication Act (“SCA,” codified at 18 U.S.C. § 2701 *et seq.*)  
6 and Foreign Intelligence Surveillance Act (“FISA,” codified at 50 U.S.C. § 1801 *et seq.*) The  
7 SCA and FISA statutes do not expressly preempt any state laws because each “lacks express  
8 statutory exclusivity language” to that effect. *Remand Order* at \*3. *See also English*, 496 U.S. at  
9 79 (1990) (express preemption occurs only where Congress “define[s] explicitly the extent to  
10 which its enactments pre-empt state law”). Verizon adds nothing here to warrant reversal of this  
11 Court’s earlier conclusion.

12 As recognized by the Court, the remedies provisions of Section 2708 of the SCA do not  
13 preempt state law claims that may coexist with a cause of action in the SCA. *Remand Order*  
14 at \*3. This section serves a limited purpose to prevent suppression of criminal evidence as a  
15 remedy for violations. *See id.*<sup>2</sup> Verizon quarrels with that holding in a footnote, *Ver. Mot.* at 12  
16 n.6, but presents nothing new to warrant revisiting this issue.

17 Verizon fares no better arguing, by reference to other briefs it has filed, that express  
18 preemption can be found in provisions in the SCA allegedly “authorizing” its actions in an  
19 “emergency” or to protect Verizon’s “property.” *Ver. Mot.* at 12. As will be explained fully in  
20 Plaintiffs’ other forthcoming briefs, an indefinite terrorist threat constitutes neither a perpetual  
21 “emergency” nor a threat to Verizon’s particular “property” so as to create a defense under the  
22 SCA. In any event Verizon confuses express preemption, which requires explicit language of  
23 express preemption, with a theoretical (and implausible) defense.

24 Verizon does not argue that any other federal law preempts the state claims at issue.  
25 Accordingly, Verizon’s express preemption claim again should be rejected.

26 \_\_\_\_\_  
27 <sup>2</sup> Indeed, the *Riordan* Plaintiffs presented this Court with substantial indication of Congress’s  
28 *express intention to preserve state law claims* throughout Title III and its amendment by the  
ECPA. *Riordan et al. v. Verizon Communications, Inc.*, Pls.’ J. Reply in Supp. of Mots. for  
Remand, Doc. No. 43 (Case No. 06-3574) at 3 n. 3.

1           **B. Federal Statutes Contemplate State Regulation of, and Do Not Preempt, the**  
 2           **Field of Electronic Privacy, Even in the Sphere of Foreign Intelligence.**

3           This Court’s Remand Order also informs why there is no field preemption of Plaintiffs’  
 4 utilities and privacy claims. Field preemption requires that Congress regulate in an area it intends  
 5 the Federal Government to occupy exclusively, which may be inferred from a “‘scheme of federal  
 6 regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the  
 7 States to supplement it,’ or where an Act of Congress ‘touches a field in which the federal interest  
 8 is so dominant that the federal system will be assumed to preclude enforcement of state laws on  
 9 the same subject.’” *English*, 496 U.S. at 79 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S.  
 10 218, 230 (1947)). This Court already rejected Verizon’s prior arguments that FISA “constitutes a  
 11 set of ‘complex, detailed and comprehensive provisions’ that ‘create a whole system under  
 12 federal control.’” *Remand Order* at \*3. The Court also observed that FISA “appear[s] to  
 13 contemplate state court litigation,” *id.*, noting FISA’s creation of procedures for federal court  
 14 review of materials obtained under a FISA order in state court cases. *Id.*; *see also* 50 U.S.C.  
 15 § 1806(f). Further, citing the fact that 50 U.S.C. § 1861(e) only grants immunity for production  
 16 of records if a FISA order has been first obtained, the Court held that “***FISA thus contemplates***  
 17 ***that, in the absence of a government order for business records under 50 U.S.C. § 1861(a)(1)***  
 18 ***(as alleged here), injured parties will have causes of action and remedies under other***  
 19 ***provisions of state and federal law.*” *Remand Order* at \*3. (emphasis added).**

20           In short, Congress not only *affirmatively* contemplated a role for state court litigation in  
 21 the field of electronic surveillance, it legislated appropriate limitations and procedures applicable  
 22 to such claims. This intention precludes a finding of field preemption. *See English*, 496 U.S. at  
 23 78-79 (preemption is “fundamentally . . . a question of congressional intent”). This is especially  
 24 true here, where the challenged state laws regulating public utilities fall within the traditional  
 25 police powers of the state. *See Kroske*, 432 F.3d at 981 (acknowledging “significant federal  
 26 presence in the regulation of national banks” but nonetheless applying presumption against  
 27 preemption where state law “was enacted pursuant to the State’s historic police powers to prohibit  
 28 discrimination on specified grounds”).

1           **C. As This Court Has Already Recognized, No Conflict Exists That Could**  
 2           **Create Conflict Preemption With Federal Statutes or Federal**  
 3           **Common Law.**

4           Verizon’s Motion includes a single sentence alluding to conflict preemption, repeating an  
 5           argument that the Court previously rebuffed: that “the federal common law requiring uniform  
 6           rules on matters pertaining to national security preempts Plaintiffs’ state law claims.” *Ver. Mot.*  
 7           at 12-13 n.6. To the contrary, “[s]tate law is [] pre-empted to the extent it actually conflicts with  
 8           federal law . . . or where the state law stands as an obstacle to the accomplishment of the full  
 9           purposes and objectives of Congress.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)  
 10          (citations omitted). As this Court found, there is no conflict with “the California laws on which  
 11          Plaintiffs’ claims are based” because those claims “do not make unlawful an act of defendants  
 12          that federal law or policy deems lawful.” *Remand Order* at \*5. “Under state and federal law,  
 13          [Verizon] may present as an affirmative defense any assertion that it acted pursuant to legal  
 14          process, including a legal federal process.” *Id.*; *see also Hill v. Nat’l Collegiate Athletic Ass’n*, 7  
 15          Cal. 4th 1, 39-40 (1990) (defendant’s asserted justification is defense to California claim for  
 16          invasion of privacy); Cal. Pub. Util. Code §§ 2891(d)(6), 2894 (legal compulsion is a defense).  
 17          The same is true of the New Jersey and Maryland laws. *See, e.g.*, N.J. Stat. Ann. § 2A:156A-25  
 18          & 2A:156A-33(a) (court order or warrant authorizing interception or disclosure of  
 19          communications is complete defense to civil action under New Jersey Wiretap Act); Md. Code  
 20          Ann., CTS. & JUD. PROC., § 10-410(b), “Wiretap & Electronic Surveillance Act” (“[g]ood faith  
 21          reliance on a court order or legislative authorization shall constitute a complete defense to any  
 22          civil or criminal action brought under this subtitle or under any other law”).

23          Verizon does not attempt to identify any genuine conflict between state and federal law;  
 24          Verizon (incorrectly) maintains that actual conflict is irrelevant. *Ver. Mot.* at 8. Accordingly,  
 25          there is no basis to revisit the Court’s conclusion that no actual conflict exists.

26           **II. WHAT VERIZON TERMS “CONSTITUTIONAL FIELD PREEMPTION” DOES**  
 27           **NOT FORECLOSE PLAINTIFFS’ CLAIMS.**

28           **A. Verizon’s “Constitutional Field Preemption” Argument Is No More Than a**  
               **Replay of Its Failed Federal Common Law Preemption Argument.**

              Having failed to persuade the Court that a federal common law (including one of foreign

1 affairs) preempts state law claims, Verizon now seeks to repackage the argument as a doctrine of  
 2 “constitutional field preemption.” They are one and the same. Tellingly, Verizon’s label appears  
 3 nowhere in 200 years of constitutional precedent: a Lexis search of “constitutional field  
 4 preemption” yields no relevant authority. By contrast, foreign affairs is one of the few recognized  
 5 areas in which federal common law *does exist*, reflecting that this is a federal common law rule.  
 6 *See Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 542 n.7 (5th Cir. 1997) (“The Supreme  
 7 Court has authorized the creation of federal common law in the area of foreign relations.”) (citing  
 8 *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)). Verizon’s current claim is  
 9 still that national defense, as a subset of federal power over foreign affairs, comprises a field of  
 10 “exclusive federal control” as to which federal interest excludes state regulation, notwithstanding  
 11 the absence of Congressional action. *Ver. Mot.* at 6-8 n.4. In fact, Verizon made exactly the  
 12 same arguments before. *See, e.g., Ver. Opp’n to Remand* at 7:20-21 (“[t]he constitution vests  
 13 ‘plenary and exclusive’ control over national security, national defense, and foreign policy in  
 14 Congress and the Executive”); *Ver. Mot.* at 6:2-3 (same argument, almost verbatim); *Ver. Opp’n*  
 15 *to Remand* at 8:27-28 (“the Constitution expressly cabins the role of the states with respect to  
 16 national defense”); *Remand Hr’g Tr.*, December 21, 2006, Doc. No. 119 (Case No. 06-3574) at  
 17 39:15-17 (Verizon’s counsel emphasizing that he was making a “very separate and independent  
 18 argument” for preemption “based solely on the Constitution”). The argument is no more  
 19 persuasive this time around. It is no more than a call for application of federal common law,  
 20 which is founded on the principle that: “a few areas, involving ‘uniquely federal interests,’ are so  
 21 committed by the Constitution and laws of the United States to federal control that state law is  
 22 pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit  
 23 statutory directive) by the courts – so-called ‘federal common law.’” *Remand Order* at 8 (*quoting*  
 24 *Boyle*, 487 U.S. at 504). In rejecting Verizon’s prior attempt to apply federal common law  
 25 preemption, this Court correctly rejected Verizon’s present position.<sup>3</sup>

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27 <sup>3</sup> Verizon makes a conclusory attempt to distinguish the Court’s prior rejection of the federal  
 28 common law argument on the basis that here the issue is one of ordinary, not complete  
 preemption. *Ver. Mot.* at 8 n.4. The distinction makes no difference. Federal common law may

1 Indeed, the Court fully addressed the preemptive reach of “uniquely federal interests” in  
 2 the Remand Order. It rightly noted that only “extremely limited” instances justify creation of  
 3 federal common law by judicial fiat rather than by recourse to Congressional intent. *See Remand*  
 4 *Order* at \*4. This is because “whether latent federal power should be exercised to displace state  
 5 law is primarily a decision for Congress, not the federal courts.” *Id.* (internal quotations omitted).  
 6 As the Court stated, “in view of Congress’s extensive legislation addressing surveillance via  
 7 FISA, portions of Title III and the SCA, it would be anomalous for the court to supplant this  
 8 detailed work with a set of federal common law rules.” *Id.* at \*5. Plaintiffs know of no case, and  
 9 Verizon has cited none, in which a court has imposed a rule of field preemption notwithstanding  
 10 that Congress, as here, “contemplate[d] state court litigation” and “causes of action and remedies  
 11 under other provisions of state . . . law.” *Id.* at \*4; *see also* Part I(B), *supra*. Here, the state and  
 12 federal laws are fully consistent and complementary, providing remedies for the same  
 13 misconduct, with the same law enforcement exclusions. Compliance with federal law necessarily  
 14 provides a “safe harbor” under state law. The Supreme Court has found state laws not preempted  
 15 where a federal statute preserves a broad role for state regulation and the state laws “would seem  
 16 to aid, rather than hinder, the functioning” of a federal statute. *See Bates v. Dow Agrosciences*  
 17 *LLC*, 544 U.S. 431, 450-51 (2005) (plaintiffs’ claims founded on inadequate pesticide labeling by  
 18 chemical company were not within scope of express preemption clause).

19 **B. The Federal Common Law of Foreign Affairs Cannot Be Stretched to**  
 20 **Govern Issues Unrelated to International Diplomacy.**

21 The pillars of Verizon’s preemption argument (*i.e.*, the cases whose holdings actually  
 22 speak to preemption of a state law) are decisions preempting state laws that interfere with the

23 apply equally as a defense to liability under state law (as Verizon now argues), or it may govern a  
 24 case and hence creates federal question jurisdiction (as Verizon previously argued). *See Empire*  
 25 *Healthchoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 141 (2d Cir. 2005), *aff’d*, 126 S. Ct. 2121  
 26 (2006) (describing doctrine and the two applications). Either way, the test from *Boyle*, 487 U.S.  
 27 500, is the touchstone to determine if federal common law governs the case. Indeed, the fact that  
 28 no distinction lies between “ordinary” and “complete” preemption by federal common law is best  
 illustrated by the fact that the issue in *Boyle* was *not* federal jurisdiction (it was a diversity  
 action), but only whether federal common law provided a defense to a state tort claim. *See id.* at  
 502, 512. Thus, it follows ineluctably from this Court’s application of *Boyle* in the Remand  
 analysis to conclude that federal common law does not apply to create federal jurisdiction that,  
 likewise, it does not create a preemption defense to the state law claims.

1 conduct of foreign affairs. By contrast, *Riordan*, *Chulsky*, and *Bready* in no way implicate  
 2 foreign affairs or foreign relations. While Verizon’s decision to hand Plaintiffs’ confidential  
 3 telephone records over to the NSA may have been motivated by an interest in national security,  
 4 there is no basis for concluding that allowing Plaintiffs to prosecute their privacy-based claims  
 5 against Verizon—a private, domestic company—will have any impact on the United States’  
 6 relations with any foreign nation. Nor were the generalized state laws Verizon challenges enacted  
 7 with any eye directed at influencing foreign affairs. Accordingly, none of the foreign relations  
 8 cases are precedent for holding the state laws preempted here.

9 For example, Verizon relies heavily on *Zschernig v. Miller*, 389 U.S. 429 (1968). That  
 10 case invalidated an Oregon statute that effectively conditioned inheritance on foreign heirs not  
 11 residing in what Oregon considered a communist or fascist regime. The Court found the statute  
 12 was “an intrusion by the State into the field of foreign affairs,” *id.* at 432, and had “more than  
 13 ‘some incidental or indirect effect in foreign countries.’” *Id.* at 434-35 (citation omitted). As the  
 14 Ninth Circuit explains, the statute struck in *Zschernig* was “seen by a Court operating at the  
 15 height of the Cold War as a potential provocation to foreign powers,” since “international  
 16 controversies of the gravest moment, sometimes even leading to war, may arise from real or  
 17 imagined wrongs to another’s subjects inflicted, or permitted, by a government.” *Deutsch v.*  
 18 *Turner Corp.*, 324 F.3d 692, 711 (9th Cir. 2003) (internal quotations omitted). By contrast, while  
 19 *Zschernig* prohibited each State from “establish[ing] its own foreign policy” (389 U.S. at 441)  
 20 here the challenged state laws do not impact foreign policy, facially or as applied to Verizon.

21 Verizon also places unwarranted reliance on *Deutsch*, 324 F.3d 692, which affirmed this  
 22 Court’s decision in *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160  
 23 (N.D. Cal. 2001). *Deutsch* affirmed preemption of a California law creating a cause of action for  
 24 victims of World War II slave labor. 324 F.3d at 703, 708. “California seeks to redress  
 25 wrongs . . . for wartime acts that California’s legislature believed had never been fairly resolved.”  
 26 *Id.* at 712. The legislature was motivated to pass the act by dissatisfaction “with how the federal  
 27 government chose to address the various wartime injuries suffered by victims” through post-war  
 28 treaties and sought “to remedy those[] injuries in a manner favored by California but not provided

1 for by the federal government.” *Id.* at 715. Indeed, as this Court noted, the statute’s terms and  
 2 legislative history “demonstrate a purpose to influence foreign affairs directly” and “target[]  
 3 particular countries,” because “California intended the statute to send an explicit foreign relations  
 4 message, rather than simply to address some local concern.” *In re WWII*, 164 F. Supp. 2d at  
 5 1173, 1174. None of the California, New Jersey, or Maryland laws Verizon seeks to preempt  
 6 here have any express purpose to affect foreign relations or, alternatively, national security. They  
 7 are directed entirely at the traditional state concerns of regulating utilities and privacy, and  
 8 warrant no finding of preemption.

9 **C. Foreign Affairs Cases, Even Where Applicable, Require Conflict With**  
 10 **Federal Policy Which Verizon Has Not Even Attempted to Demonstrate Here.**

11 Beyond the fact that this is not a foreign affairs case, Verizon’s argument also fails  
 12 because it wrongly asserts that preemption may pertain as a constitutionally existential principle,  
 13 regardless of any conflict between state law and federal policy. *Ver. Mot.* at 8. To the contrary,  
 14 even in the paradigm realm of foreign relations, state laws have not been held preempted in a  
 15 constitutional vacuum. As the Ninth Circuit explained in *Deutsch*, affirming this Court:

16 Despite the broad language of *Pink* and the Chinese Exclusion Case, however,  
 17 *Zschernig* is “[t]he only case in which the Supreme Court has struck down a state  
 18 statute as violative of the foreign affairs power.” *Zschernig* has been applied  
 19 sparingly, because the Supreme Court has held that a statute *does not violate the*  
*constitution where it merely has “some incidental or indirect effect in foreign*  
*countries.”* *Clark v. Allen*, 331 U.S. 503, 517 (1947).

20 *Deutsch*, 324 F.3d at 710 (some citations omitted) (emphasis added). Hence, “there is a threshold  
 21 level of involvement in and impact on foreign affairs which the states may not exceed.” *In re*  
 22 *WWII*, 164 F. Supp. 2d at 1171 (quoting *National Foreign Trade Council v. Natsios*, 181 F.3d 38,  
 23 49-57 (1st Cir. 1999)). Verizon, by contrast, simply refuses to accept that states may regulate in  
 24 ways that have even an “incidental or indirect” effect on national security or defense. It has not  
 25 attempted to show that the state laws Plaintiffs assert would cross any threshold.

26 Further, more recent Supreme Court precedent has reinforced the significance of finding  
 27 conflict even in the narrow circumstance where foreign affairs are actually implicated by a state  
 28



1 law. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).<sup>4</sup> California statutes  
 2 challenged in *Garamendi* prohibited insurers from doing business in the state unless they  
 3 compiled and disclosed a vast database of information about policies sold before and during  
 4 World War II, notwithstanding Executive Agreements entered into by the President establishing  
 5 an international procedure to remedy holocaust victims' claims. *See id.* at 401. The Court held  
 6 that "[t]he express federal policy and the *clear conflict* raised by the state statute [were] alone  
 7 enough to require state law to yield." *Id.* at 425 (emphasis added). Among other things, the state  
 8 law interfered with the President's economic and diplomatic leverage with foreign nations;  
 9 pursued coercion and litigation instead of voluntary funding; and presented "an obstacle to the  
 10 success of the National Government's chosen 'calibration of force' in dealing with the Europeans  
 11 using a voluntary approach." *Id.* at 420-425. As the Supreme Court summarized:

12           The basic fact is that California seeks to use an iron fist where the President has  
 13 consistently chosen kid gloves. . . . *The question relevant to preemption in this*  
 14 *case is conflict*, and the evidence here is more than sufficient to demonstrate that  
 the state Act stands in the way of [the President's] diplomatic objectives.

15 *Id.* at 427 (emphasis added).

16           In addition, the *Garamendi* Court emphasized the need to consider "the strength of the  
 17 state interest, judged by standards of traditional practice, when deciding how serious a conflict  
 18 must be shown before declaring the state law preempted." *Id.* at 420. The Court concluded that  
 19 California's unusual legislation, which "singles out only policies issued by European companies,  
 20 in Europe, to European residents, at least 55 years ago," reflected the "weakness of the State's  
 21 interest, against the backdrop of traditional state legislative subject matter . . . ." *Id.* at 425-26.

22           By contrast, Verizon makes no effort to dispute the powerful interest and "traditional  
 23 competence," *id.* at 425 n. 11, of the states to regulate public utilities and their duties to  
 24 consumers. Nevertheless, Verizon demonstrated any actual conflict between the state laws and a

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25  
 26 <sup>4</sup> Contrary to Verizon's claim that conflict is never required to preempt state laws touching the  
 27 arena of foreign affairs, the Supreme Court in *Garamendi* acknowledged—but declined to answer  
 28 categorically—what it described as the "fair question" presented by "the contrasting theories of  
 field and conflict preemption evident in the *Zschernig* opinions." *Id.* at 419. The Court instead  
 applied a balancing test weighing both the degree of conflict and the extent of traditional  
 competence of the state in the regulated arena.

1 valid federal exercise of power. Rather, Verizon erroneously asserts that preemption requires no  
 2 showing of conflict whatsoever, saying only that “[c]onflict is inherent in the state laws’ very  
 3 effort to reach into the sphere of national security.” *Ver. Mot.* at 8. That statement is mere *ipse*  
 4 *dixit* here, where the state laws are of general applicability, were not passed in any “effort” to  
 5 influence national security, and, coterminus with federal law, allow disclosure of records, in the  
 6 event of lawful process and thus would have at most an indirect and inconsequential effect on  
 7 intelligence gathering.

8 **D. Verizon’s Cases Do Not Support Preemption Based on a Generalized Federal**  
 9 **Interest in National Security.**

10 Verizon labors to patch together support for an assertion that the constitution’s bare  
 11 allocation of responsibilities for national defense, without more, requires preemption. It succeeds  
 12 admirably in culling quotes from otherwise irrelevant authorities. But no court has previously  
 13 recognized, and no authority warrants, expanding the “sparingly applied” foreign affairs doctrine  
 14 *Deutsch*, 324 F.3d at 692, to national defense. At bottom, Verizon can find no authority holding a  
 15 state law preempted by the Constitution’s *mere allocation* of war and defense powers to the  
 16 federal government, without reference to either conflicting *federal exercise* of that power, or to an  
 17 explicit finding of *interference* of the state law with express U.S. policy.

18 Indeed, the Massachusetts Supreme Court rejected an argument similar to Verizon’s, that  
 19 “any regulation which interferes with the conduct of a [Department of Defense] research program  
 20 is preempted by the Constitution’s grant of war and defense powers to the Federal government.”  
 21 *Arthur D. Little, Inc. v. Comm’r of Health & Hosps.*, 395 Mass. 535, 546 (1985) (upholding  
 22 regulation prohibiting uses of chemical warfare agents notwithstanding impact on research  
 23 activities carried out by ADL pursuant to contracts with the Department of Defense). The court  
 24 declined to find preemption, recognizing that “not every regulation which has some incidental  
 25 effect on a defense program is invalid under the supremacy clause.” *Id.* at 547.

26 By contrast, although Verizon’s brief quotes freely from authorities that recognize federal  
 27  
 28

1 interests in foreign policy, war, and military affairs, *Ver. Mot.* at 6,<sup>5</sup> none of them hold a state law  
 2 preempted on the basis of naked constitutional supremacy in national security generally, much  
 3 less constitutional supremacy in regulating public utilities. For example, *Tarble's Case*, 80 U.S.  
 4 (13 Wall.) 397 (1872), stated the issue decided as “[w]hether any judicial officer of a State has  
 5 jurisdiction to issue a writ of habeas corpus . . . for the discharge of a person *held under the*  
 6 *authority, or claim and color of the authority, of the United States by an officer of that*  
 7 *government.*” *Id.* at 402 (emphasis added). It stands for the unexceptional proposition that the  
 8 federal government has supremacy in any case, military or not, in which a state court attempts to  
 9 affirmatively force it to act in a manner that conflicts with federal law. *Id.* at 407.

10 Further, the issue in *Stehney v. Perry* is one of conflict preemption, not constitutional  
 11 power. 101 F.3d 925, 938 n.10 (3d Cir. 1996). A New Jersey law prohibiting employer  
 12 polygraphs was held to be an “obstacle” to the federal Employee Polygraph Protection Act, which  
 13 “provide[d] that states may not regulate or prohibit the federal government from requiring  
 14 employees of NSA contractors to take polygraph examinations.” *Id.* The Third Circuit, in fact,  
 15 expressly declined to premise preemption on constitutional war powers under Article I § 8 and  
 16 Article II § 2 of the U.S. Constitution. *Id.*<sup>6</sup>

17 Finally, Verizon relies on an unpublished opinion striking down Oakland’s Nuclear Free  
 18 Zone Ordinance. *United States v. City of Oakland*, No. C-89-3305 (N.D. Cal. Aug. 23, 1990),  
 19 *Ver. Mot.* Exh. 1. That case, which appears never to have been cited by another court, is  
 20 inapposite for several reasons. First, the Oakland ordinance prohibited all “persons”—defined to  
 21 include the federal government—from a host of activities, including development, testing,  
 22 production, maintenance, transportation, storage, research or evaluation of nuclear weapons

23 \_\_\_\_\_  
 24 <sup>5</sup> Verizon previously cited nearly all of these cases. *See Ver. Opp’n to Mot. to Remand* at (ii-iv).

25 <sup>6</sup> The actual holdings in Verizon’s other purported authorities are also wholly inapplicable. *See,*  
 26 *e.g., Perpich v. Dep’t of Defense*, 496 U.S. 334 (1990) (no state law challenged; federal statute  
 27 withdrawing a previous statutory right of governors to veto training outside the U.S. of “dual  
 28 enlistment” members of National Guard /Army Reserves upheld as consistent with Militia  
 Clauses); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (affirming validity of contract  
 between Snepp and CIA restricting his disclosure of information absent pre-publication review  
 from CIA); *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) (affirming validity of  
 secrecy agreement signed by Marchetti upon joining CIA).

1 within Oakland. *Id.* at 2. Second, the court found the ordinance was not only “clearly designed  
 2 to interfere with” U.S. nuclear policy, but that it in fact would “clearly interfere with the United  
 3 State defense policy directly and substantially.” *Id.* at 9 (emphasis added). Third, unlike  
 4 *Oakland*, Plaintiffs here do not directly target the government. *Cf. id.* at 10 (distinguishing  
 5 contrary authority on that basis). Fourth, unlike regulation of nuclear defense, the state laws  
 6 regulating public utility records fall squarely within the traditional competency of the states.

7 In summary, Verizon has not approached the showing needed to overcome the  
 8 presumption against preemption of the sovereign state laws at issue. This case lies far outside the  
 9 “sparingly applied” rule of foreign affairs preemption. And even if that rule were dramatically  
 10 expanded beyond all precedent to reach national security or intelligence surveillance, this Court’s  
 11 prior finding of no conflict between state and federal law remains dispositive.

12 **III. THE STATE LAWS AT ISSUE CANNOT BE PREEMPTED DIRECTLY UNDER**  
 13 **THE SUPREMACY CLAUSE.**

14 Under a direct application of the intergovernmental immunity clause, a state law may also  
 15 run afoul of the Supremacy Clause, but “only if it regulates the United States directly or  
 16 discriminates against the Federal Government or those with whom it deals.” *North Dakota v.*  
 17 *United States*, 495 U.S. 423, 435 (1990). Verizon’s backstop argument for such preemption fails  
 18 because Plaintiffs’ state claims by no means constitute efforts to regulate “directly” the Federal  
 19 Government; nor do they “discriminate” against Verizon in any way, let alone on the basis of  
 20 rendering voluntary assistance to the federal government.

21 As an initial matter, *North Dakota’s* “direct regulation or discrimination” test recognizes  
 22 that “[w]hatever burdens are imposed on the Federal Government by a neutral state law  
 23 regulating its suppliers are but normal incidents of the organization within the same territory of  
 24 two governments.” *Id.* at 435. Moreover, the test entails a “functional approach to claims of  
 25 governmental immunity, accommodating of the full range of each sovereign’s legislative  
 26 authority and respectful of the primary role of Congress in resolving conflicts between National  
 27 and State Government.” *Id.* Here, the state laws at issue are neutral and generally applicable  
 28 regulations. Congress itself contemplated state law claims against private entities relating to

1 surveillance in the absence of a FISA order. *Remand Order* at \*4. Accordingly there is no room  
2 whatsoever to find preemption under the Supremacy Clause directly.

3 **A. Plaintiffs' State Law Claims Do Not Directly Regulate the Federal**  
4 **Government**

5 Plaintiffs' claims cannot reasonably be said to constitute regulation of the federal  
6 government directly. Their claims are not asserted against the federal government. They impose  
7 no requirements on the federal government to do anything at all. They merely seek to enforce  
8 state privacy and consumer protection laws against private utilities.

9 The Supreme Court's most recent, and most analogous, ruling on this subject is *North*  
10 *Dakota*, 495 U.S. at 423. There, the Supreme Court upheld the constitutionality of laws that  
11 required out-of-state shippers of alcoholic beverages to file monthly reports and to affix a label to  
12 each bottle of liquor sold to federal military enclaves. *Id.* at 426. The Court noted that "[t]here is  
13 no claim in this case, nor could there be, that North Dakota regulates the Federal Government  
14 directly," because the laws operated against suppliers, not the government. *Id.* at 436-37.  
15 Accordingly, "concerns about direct interference . . . are not implicated." *Id.* at 437 (internal  
16 citations omitted). Similarly here, the state laws operate only against Verizon, which is turning  
17 over information to the government, not against the government itself.<sup>7</sup>

18 The authorities Verizon cites in which state laws were preempted as attempts to directly  
19 regulate or control the federal government are not analogous. In two cases the plaintiffs sought to

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20  
21 <sup>7</sup> To the extent Verizon suggests that it was acting as a "federal agent" and is entitled to  
22 sovereign immunity, it has not made any showing to support such a finding. At most, Verizon  
23 asserts that it acted as an agent of the NSA. *See Ver. Mot.* at 11 n.5. Finding a private entity is  
24 entitled to partake in the intergovernmental sovereign immunity, however, "requires something  
25 more than the invocation of traditional agency notions." *United States v. New Mexico*, 455 U.S.  
26 720, 736 (1982) (holding contractor that provided services to government not entitled to tax  
27 immunity under principles of sovereign immunity) (internal quotations omitted). Rather, a  
28 private entity must "actually stand in the Government's shoes," a claim Verizon has not made.  
*Id.* Further, *Kentucky ex rel. Hancock v. Ruckelshaus*, which Verizon cites for the proposition  
that "[t]he sovereign can only act through its agents" is inapt because there, defendants were the  
*heads* of various *federal* departments and agencies. 497 F.2d 1172, 1175 (6th Cir. 1974), *aff'd*,  
426 U.S. 167 (1976) ("We view the action against the non-TVA defendants as a suit against the  
United States."). It is also irrelevant that this Court found jurisdiction under the removal statute  
for entities "acting under" the direction of the government, 28 U.S.C. § 1442(a)(1). If Verizon  
contends that finding jurisdiction under that statute has some relevant relation to conferring  
sovereign immunity on a private entity, it has not illuminated that theory.

1 exact fees from the United States, whereas Plaintiffs do not seek money or anything else from the  
 2 government. *See Mayo v. United States*, 319 U.S. 441, 447 (1943) (striking down inspection fees  
 3 “laid directly upon the United States”); *City of Los Angeles v. United States*, 355 F. Supp. 461,  
 4 464 (C.D. Cal. 1972) (striking municipal pilotage fees levied by the city against the United States  
 5 Navy); but *cf. United States v. New Mexico*, 455 U.S. 720 (1982) (upholding taxes on federal  
 6 contractors). In *Hancock v. Train*, the state Attorney General sought to force the U.S. Army,  
 7 TVA, and the Atomic Energy Commission to obtain state air pollution permits for facilities on  
 8 federal installations—a direct “prohibition on the Federal Government.” 426 U.S. 167, 174, 180  
 9 (1976). *Cf. Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996) (requiring National  
 10 Parks Service to post signage and ropes indicating water depth under River Resort Act would  
 11 constitute “direct and intrusive” regulation of Federal Government’s operation of its property at  
 12 Yosemite). Verizon’s attempts to piece together quotes cannot support the incorrect assertion that  
 13 the “intergovernmental immunity doctrine prevents the states from applying even generally  
 14 applicable rules to a federal program.” *Ver. Mot.* at 10.<sup>8</sup> The challenged state laws impose no  
 15 direct regulations on the Federal Government, as would be required to preempt them.

16 **B. Plaintiffs’ State Law Claims Do Not Discriminate Against the Government.**

17 Plaintiffs’ claims are also not preempted simply because they may bear incidentally on a  
 18 government program. “Neither the Supremacy Clause nor the Plenary Powers Clause bars all  
 19 state regulation which may touch the activities of the Federal Government.” *Hancock*, 426 U.S.  
 20 at 179. Indeed, 70 years have now passed since the Supreme Court “decisively rejected the  
 21 argument that any state regulation which *indirectly regulates* the Federal Government’s activity is  
 22 unconstitutional,” a view now “thoroughly repudiated.” *North Dakota*, 495 U.S. at 434-435  
 23 (internal citation omitted) (emphasis added). At most, application of the neutral state laws here  
 24 would have an indirect effect on the alleged NSA programs but, in any event, no effect beyond  
 25

26 <sup>8</sup> Verizon’s reliance on *Johnson v. Maryland* for this assertion is untenable, as it held only that a  
 27 state could not require a federal postal employee to obtain a state driver’s license to drive a mail  
 28 truck. 254 U.S. 51 (1920). Regardless, it was also from the period preceding the Court’s  
 “decisive rejection” of the principle that “any state regulation which indirectly regulates the  
 Federal Government’s activity is unconstitutional.” *See North Dakota*, 495 U.S. at 434.

1 application of parallel federal law. The program’s volunteers, including Verizon, may become  
 2 more vigilant in obtaining proper legal process *before* supplying the NSA with customer call  
 3 records or access to communications. Indeed, that may already be the trend, given the public  
 4 outrage over Defendants’ wholesale breach of customer privacy rights. Regardless, even such an  
 5 incidental effect would be inconsequential in the preemption analysis. As in *North Dakota*, if an  
 6 impact of unknown severity is to be deemed sufficient to negate state law, it would be for  
 7 Congress, not a court, to impose preemption. *Id.* at 444 (for Court to preempt state law based on  
 8 unquantified burden of labeling and reporting would be “unwise and . . . unwarranted”).

9 Rather, absent direct regulation of the government, the Court could deem state law claims  
 10 preempted only if they “discriminate against” Verizon or other telecommunications companies,  
 11 which they obviously do not. A “[s]tate does not discriminate against the Federal Government  
 12 and those with whom it deals unless it treats someone else better than it treats them.” *Washington*  
 13 *v. United States*, 460 U.S. 536, 544-545 n.10 (1983). Here, the asserted state laws make no  
 14 distinction based on the government’s involvement. They regulate equally all public utilities and  
 15 any unauthorized disclosure, not merely disclosure to the federal government. These statutes  
 16 cannot *disfavor* the government as compared to other entities, again because they accommodate a  
 17 defense of lawful process regardless of whether the source is state or federal authorization. Nor  
 18 do Plaintiffs seek to restrict the parties with whom the government can contract. *See Ver. Mot.*  
 19 at 12. The government can always enlist Verizon and other companies to supply call records; the  
 20 companies must simply comply with applicable, non-discriminatory state law.

21 What Verizon seeks is actually preferential treatment for itself for having volunteered to  
 22 assist the NSA in disregard for the governing laws and without lawful authorization. That,  
 23 however, is no grounds for preemption.

24 **IV. NONE OF THE *CHULSKY* CLAIMS SHOULD BE DISMISSED UNDER**  
 25 **RULE 9(B).**

26 Verizon is wrong that Federal Rule of Civil Procedure 9(b) requires dismissal of three of  
 27 the nine claims in *Chulsky*: Count IV (misrepresentation), Count VI (N.J. Consumer Fraud Act)  
 28 and Count VIII (N.J. Deceptive Business Practices). *Ver. Mot.* at 13-14.

1           **A. Rule 9(b) Does Not Apply to *Chulsky*'s Misrepresentation Claim.**

2           “Because a claim of misrepresentation is distinct from a claim of fraud under state law,  
3 Rule 9(b) does not apply to the former according to its terms.” *In re Cendant Corp.*, 190 F.R.D.  
4 331, 337 (D.N.J. 1999); *see also*, 5A Charles Alan Wright, et al., Federal Practice and Procedure  
5 § 1297 (3d ed 2004) (“[b]y its terms . . . Rule 9(b) applies only to averments of fraud,” “its scope  
6 of application should be construed narrowly and not extended to other legal theories”). Indeed,  
7 this District recently rejected the same argument Verizon makes here as “highly unpersuasive,”  
8 holding that common-law misrepresentation claims are outside the scope of Rule 9(b). *Forté*  
9 *Capital Partners v. Cramer*, No. 07-CV-01237, 2007 U.S. Dist. LEXIS 40126, at \*22-23, 2007  
10 WL 1430052, at \* 8 (N.D. Cal., May 14, 2007) (citing multiple authorities).

11           Tellingly, the lone case that Verizon cites in support of its argument that Rule 9(b) applies  
12 to *Chulsky*'s misrepresentation claim held only that fraud claims are subject to the particularity  
13 requirement of Rule 9(b). *FDIC v. Bathgate*, 27 F.3d 850, 876 (3d Cir. 1994) (affirming District  
14 Court's holding that New Jersey Consumer Fraud Act and common law fraud claims are subject  
15 to the particularity requirement of Rule 9(b)). Accordingly, Verizon's argument that Rule 9(b)  
16 applies to misrepresentation claims is incorrect.

17           **B. *Chulsky*'s Allegations of Fraud Are Specific and Satisfy Rule 9(b).**

18           *Chulsky*'s claims under the N.J. Consumer Fraud Act (Count VI), and the N.J. Deceptive  
19 Business Practices Act (Count VIII), are specific and satisfy the pleading requirements of  
20 Rule 9(b). Rule 9(b)'s “particularity requirement is satisfied if the allegations of fraud are  
21 specific enough to give a defendant notice of the alleged misconduct so that it can defend against  
22 the charge and not just deny any wrongdoing.” *In re Heritage Bond Litig.*, 289 F. Supp. 2d 1132,  
23 1146 (C.D. Cal. 2003) (citing *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)); *see also*,  
24 *Odom v. Microsoft Corp.*, No. 04- CV-35468, 2007 U.S. App. LEXIS 10519, 2007 WL 1297249,  
25 at \*12 (9th Cir. May 4, 2007) (reversing dismissal, explaining that Rule 9(b) only “requires the  
26 identification of the circumstances constituting fraud so that the defendant can prepare an  
27 adequate answer from the allegations”). Here, Verizon has ample notice of its misconduct. The  
28 *Chulsky* plaintiffs specifically allege that Verizon, through its subscriber agreements, promotional



1 literature and written notices, falsely represented to customers that it would not disclose their  
 2 communications and records without consent or court order. *Chulsky* Am. Compl. ¶¶ 92, 97, 125.  
 3 At the very same time, Verizon was disclosing customer communications and records without  
 4 giving customers any notice or obtaining their consent, and without warrant, court order, or any  
 5 other appropriate certifications. *Id.* ¶¶ 1, 42, 70, 71, 92, 125. These allegations are specific  
 6 enough to give Verizon ample notice of the misconduct alleged so that it can prepare and answer  
 7 and defend itself. Verizon is well aware of its own published customer privacy policies.

8 **C. Should the Court Find *Chulsky*'s Allegations of Fraud Are Not Specific**  
 9 **Enough to Satisfy Rule 9(b), Leave to Amend Should Be Freely Granted.**

10 In the event the Court finds that the *Chulsky* allegations grounded in fraud and  
 11 misrepresentation do not comply with Rule 9(b), the *Chulsky* plaintiffs hereby respectfully  
 12 request leave to amend their pleadings under Rule 15(a). *See Vess v. Ciba-Geigy Corp. USA*, 317  
 13 F.3d 1097, 1108 (9th Cir. 2003) (“As with Rule 12(b)(6) dismissals, dismissals for failure to  
 14 comply with Rule 9(b) should ordinarily be without prejudice. ‘Leave to amend should be  
 15 granted if it appears at all possible that the plaintiff can correct the defect.’”) (citation omitted);  
 16 *see also, Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (leave to  
 17 amend under Rule 15 is “to be applied with extreme liberality”). The *Chulsky* plaintiffs can  
 18 readily plead and provide Verizon with its own published subscriber agreements, promotional  
 19 literature and written notices where Verizon vowed to protect its customers’ privacy.

20 **V. CHULSKY’S CONTRACT CLAIMS SATISFY NOTICE PLEADING STANDARDS**  
 21 **UNDER RULE 8.**

22 “Notice pleading does not impose heightened pleading standards when alleging a breach  
 23 of contract.” *Chaganti v. I2 Phone Int’l Inc.*, No. 04-CV-0987, 2005 WL 679664, at \*3 (N.D.  
 24 Cal. March 11, 2005 ) (Walker, J.). Notwithstanding this well-settled law, Verizon insists that  
 25 Rule 8 requires the *Chulsky* Plaintiffs’ claims for breach of contract (Count III) and for violation  
 26 of the Truth-in-Consumer-Contract Act (Count VII) to be dismissed because “no specific  
 27 customer agreement is attached, quoted, or even cited.” *Ver. Mot.* at 15. Contracts are not  
 28 required to be pled in their entirety to satisfy the federal notice pleading standards. *Bicoastal*

1 *Corp. v. Aetna Cas. and Sur. Co.*, No. C-94-20108, 1994 WL 564539, at \*3 (N.D. Cal Oct. 4,  
 2 1994 ) (citing *Venture Assoc. Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir.  
 3 1993) (“A plaintiff is under no obligation to attach to her complaint documents upon which her  
 4 action is based.”). Thus, plaintiffs need not attach a “specific customer agreement” that Verizon  
 5 breached, but merely “plead it according to its effect.” *Northwest Pipe Co. v. Travelers Indem.*  
 6 *Co.*, No. 02-CV-04189, 2003 U.S. Dist. LEXIS 26416, at \*10, 2003 WL 24027882, at \*3 (N.D.  
 7 Cal. Feb. 12, 2003). “So long as Plaintiff has pleaded all of the elements of a breach of contract  
 8 claim, however, its claim may stand.” *Id.*; see also *Chaganti*, 2005 WL 679664, at \*4 (“The  
 9 purpose of the complaint is to give defendants notice of the causes of action. . . . Plaintiff has  
 10 alleged the existence of a contract. If defendants believe there was no valid contract, summary  
 11 judgment or trial will provide an appropriate forum to make that determination.”).

12 Here, the *Chulsky* Plaintiffs have pleaded all elements of their breach-of-contract claims,  
 13 including the existence of the Verizon customer agreements, pertinent terms, breach, and  
 14 damages. *Chulsky Am. Compl.* ¶¶ 91, 92, 94, 97, 123, *supra*. Accordingly, Verizon’s motion to  
 15 dismiss Counts III and VII under Rule 8 fails.

16 Should the Court find that Rule 8 requires plaintiffs to provide Verizon with its own  
 17 “specific customer agreement” to give fair notice of the breach-of-contract claims, the *Chulsky*  
 18 plaintiffs hereby respectfully request leave to amend. See *Eminence Capital*, 316 F.3d at 1051.

### 19 CONCLUSION

20 For the reasons set forth above, this Court should deny Verizon’s Motion to Dismiss the  
 21 *Chulsky, Riordan, and Bready* Complaints.

22 Respectfully,

23 Dated: June 8, 2007

FENWICK & WEST LLP

25 By:                   /s/ Laurence F. Pulgram                    
 26 Laurence F. Pulgram

27 Attorneys for Plaintiffs  
 28 Dennis P. Riordan, et al.

