7/23/26

No. 26-133

In The Supreme Court of the United States

ALBERT YUM,

Petitioner,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., *et al.*,

Respondent,

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title V of the Gramm-Leach-Bliley Act ("GLBA"), under Section 6807 (also known as the "savings clause"), allows for states to create legislation that provide greater privacy protections for consumers in controlling what Congress has defined as "non-public personal information." The state of California, in enacting their own legislative version titled California Financial Information Privacy Act ("SB 1"), extends this definition of "non-public personal information" to include any information contained about a person in a "consumer report". (See Cal. Fin. Code § 4052(b)(7)). Previously, the Ninth Circuit remanded and upheld a district court ruling that pre-empts the Fair Credit Reporting Act ("FCRA") definition of "consumer reports", from the affiliate sharing provision pursuant to § 4053(b)(1) of California SB 1. See *American Bankers Ass'ns v. Lockyer*, 541, 1214 (9th Cir. 2008). Judicial opinion on a constitutional privacy claim made in connection with § 4053(b)(4) of SB 1 and the federal Equal Credit Opportunity Act ("ECOA"), currently does not exist in the state or federal courts.

Therefore, the questions presented ask:

1. Whether "consumer credit reports" as defined by the FCRA, holds deference to apply to § 4053(b)(4) of California's SB 1, when a creditor has failed to comply with the notice requirements relating to § 1691(d)(1)-(3) of the federal ECOA.
2. Whether a state "right to privacy" under Cal. Const. Art. 1 § 1 and California SB 1, is an adequate post-deprivation due process claim per 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDINGS

Petitioner Albert Yum is proceeding in this action as Plaintiff Pro Se in the lower trial court cases filed in the Orange County Superior Court. Respondents in this court are American Express Travel Related Services Company, Inc. and American Express National Bank collectively d/b/a AMEX. Additional respondents include, U.S. Bancorp, SoFi Lending Corp., and Wells Fargo Bank National Association.

Petitioner Albert Yum is the petitioner in the petition for writ of mandate filed in Fourth Appellate District of the California Court of Appeals, and subsequently the petitioner for the petition for review filed in the California Supreme Court. Respondent for these petitions will be the Orange County Superior Court for the State of California.

LIST OF RELATED PROCEEDINGS

The following proceedings are directly related within the meaning of Rule 14:

- *Yum vs. American Express Travel Related Services, Inc. et al.*, Case No. 30-2025-0153755 (Orange County Superior Court for the State of California, September 25, 2025)
- *Yum vs. U.S. Bancorp et al.*, Case No. 30-2025-01532627 (Orange County Superior Court for the State of California, December 12, 2025)
- *Yum vs. Orange County Superior Court*, Case No. G066563 (California Court of Appeals Fourth Appellate District, Division Three. Petition for Writ of Mandamus and/or other Extraordinary Relief denied on February 26, 2026)
- *Yum vs. Orange County Superior Court*, Case No. S295518 (California Supreme Court. Petition for Review denied *en banc* on April 29, 2026)

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Petitioner, Albert Yum respectfully prays that this Court grant a writ of certiorari to review the decisions from the California Fourth Appellate District Court of Appeals, Division Three and the California Supreme Court.

INTRODUCTION

A remedy for violations of rights protected by the Fourteenth Amendment, which is part of the Bill of Rights, is not specified in the U.S. Constitution. Rather, Congress established a civil cause of action that is codified in 42 U.S.C. § 1983, allowing citizens to recover damages caused by the violation of those rights, which state and local government officials are required to oblige by while carrying out their duties.

Nonetheless, section 1983's promise can be undermined in a number of ways through the adoption and extension of qualified immunity for individual officials acting under color of law, by rejecting local governmental entities and their vicarious liability for acts carried out in the course of their official duties; and by holding state entities completely immune from liability of those damages. These obstacles have been set by Congress as a starting point for anyone hoping to prevail on a section 1983 claim. The Court has also reasoned that federal courts should be hesitant to intrude into state sovereignty by adopting theories that restrict federal liability under section 1983.

Even during situations where the claimant has alleged a violation of state constitutional rights, section 1983 does not apply unless supported with a sufficient federal claim. In order to seek damages resulting from a state constitutional infringement, litigants must turn to state legislatures or state courts for proper instruction. While some courts have declined to acknowledge such actions in the absence of statutory authority, district courts in several other states have implied a cause of action. This Court has used the argument that Congress intended to include common law theories as one way to justify denying recovery of damages. However, Congress's adoption of section 1983, if interpreted too liberally with the statute itself, precisely indicates that the common law is unable to fully protect an individual's constitutional rights.

Because Congress did not intend to revoke the state's constitutional protection from being sued in federal court, the Eleventh Amendment protected state governmental organizations from liability for damages under claims brought under section 1983. However, state culpability in cases brought in state courts to correct state constitutional claims is unaffected by the Eleventh Amendment. Instead, state courts must decide whether sovereign immunity can or does prohibit lawsuits against state institutions based on common law, statute(s), or the constitution.

The judicial restrictions on the causes of action it has implied against federal officials who violate rights guaranteed by the U.S. Constitution do not apply to state courts that recognize an action for damages to remedy violation of the state constitution. This Court has also stated that no mechanism exists to deter or prevent violations of important individual's state constitutional rights absent a damages remedy.

The innocent citizen who then has been injured by the violation of their federal constitutional rights is frequently left without a means for recourse. State courts will only give voice to this Court's decision if they refuse to uncritically adopt the Court's interpretations of section 1983 and the implied causes of action under the Fourteenth Amendment of the U.S. Constitution, quoting Marbury v. Madison, which states, "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." See *Marbury v. Madison*, 5 U.S. 137 (1803). A silence of opinion should not deter state courts from carrying out their constitutional duties.

OPINIONS AND ORDERS

The order of the Fourth Appellate District Court denying the petition for a writ of mandate on February 26, 2026; and the order denying petition for review from the California Supreme Court on April 29, 2026 are unreported and unpublished. Pet. App. 1a, 2a. The final judgment from the Orange County Superior Court issued on May 1, 2026 is unreported and unpublished. Pet. App. 4a.

JURISDICTION

The petition for review submitted to the California Supreme Court was denied *en banc* on April 29, 2026. This petition is timely regarding the most recent order by the California Supreme Court and it is being filed within 90 days as matter to be heard before this Court pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 1257(a). This Court has Appellate Court jurisdiction to proceed pursuant to U.S. Const. Art. III, § 2, cl. 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Amendments

The Due Process Clause 14th Amendment, Section I

...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...

The Supremacy Clause Article VI, Clause 2

...This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the Supreme Law of the Land

The Vesting Clause Article III Section II, Clause 2

...the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make...

Statutory Provisions

Civil Action for Deprivation of Rights

42 U.S.C. § 1983:

...Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Certiorari for State Court Decisions

28 U.S.C. § 1257(a):

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Equal Credit Opportunity Act ("ECOA")

15 U.S.C. § 1691(d)(2)-(3):

(d) Reason for adverse action; procedure applicable; "adverse action" defined

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by— (A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or (B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

California Financial Information Privacy Act ("SB 1")

Cal. Fin. Code § 4053(b)(4):

(4) A financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or a financial service because the consumer has directed pursuant to this subdivision that nonpublic personal information pertaining to him or her not be disclosed.

The Gramm-Leach Bliley Act ("GLBA")

15 U.S.C. § 6801(a)

(a) it is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customer's nonpublic personal information.

15 U.S.C. § 6807

(a) This subchapter and the amendments made by this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.

(b) For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter and the amendments made by this subchapter, as determined by the Bureau of Consumer Financial Protection, after consultation with the agency or authority with jurisdiction under Section 6805(a) of this title or of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

STATEMENT OF CASE

A. Factual Background

The Consumer Finance Protection Bureau (CFPB), under Regulation B, require creditors under the guidelines of the federal Equal Credit Opportunity Act ("ECOA"), to provide disclosure of "specific reasons" when denying or otherwise taking adverse action on a credit application. Like the ECOA, the federal Fair Credit Reporting Act ("FCRA"), also requires creditors to provide certain disclosures to credit applicants on which corrective action can be taken to correct their credit reporting status whenever adverse action is taken on a request for extension of credit.

The combined FCRA-ECOA disclosure requirements provides that the reasons must be "specific." Simply stating that a credit score was used or that adverse information reporting from a credit report was used a basis for the adverse action are insufficient reasons to deny credit and is a violation of the notice requirements under § 1691(d)(3) of the ECOA. (See 12 CFR § 1002.9(b)(2)). As mentioned in a later section, the purpose and scope of the ECOA was to provide "credit applicants" with full disclosure on how to fix any delinquencies in their credit standing or creditworthiness before being illegally discriminated from the creditor or financial institution. Permissible purpose to disclose a consumer's credit report granted by the FCRA, does not fulfill the ECOA requirements for providing "specific reasons" under Regulation B. *Id.* § 1002.9(b)(2) Comment 9(b)(2)-9. The CFPB has specified the importance of both federal requirements whenever adverse action is taken on a credit application.

Petitioner's state privacy claim under the California Constitution and California SB 1, is supplemented by a provision in Regulation B that states, "on the applicant's request, any information the applicant may present that tends to indicate the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness." Id. § 1002.6(b)(6)(ii). Although Regulation B's primary focus is providing the framework for disclosures relating to the ECOA, this key provision demonstrates the applicability of California SB 1 and the federal GLBA; and Congress intent in providing consumer choices in how their non-public personal information is used by financial institutions. The Ninth Circuit ruled that the FCRA pre-empts California SB 1, only to the extent that financial institutions may disclose "consumer report information" amongst each other under the affiliate sharing provision of § 4053(b)(1). No such pre-emption clause exists under other subsections of § 4053(b), including § 4053(b)(4).

This Court's supremacy clause provides jurisdiction to review appeals directly from the state courts, for decisions involving matters related to federal statutes, treaties, or constitutional law. Congress allowed for this jurisprudence under the Judiciary Act of 1789, which gives this Court power to review appeals from "final judgments" issued by the state's highest court regarding matters involving federal law. (See Pet. App. 16a, 28 U.S.C. § 1257(a)).

When a state ruling "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," the Court will assume there is no adequate and independent state ground, unless the state court made a "plain statement" clearly indicating otherwise. See *Michigan v. Long*, 463 U.S. 1032 (1983). Most of this Court has since followed the "plain statement" approach in resolving most state cases involving or addressing federal law; where there was "considerable uncertainty" as to the precise grounds for the state decision or where the state court did not issue an opinion. During those instances, the Court has vacated the decision and remanded to the state court for clarification.

The adequate and independent state ground doctrine provides an incentive for state courts to develop and apply state constitutional law distinctly from federal law. In the event a losing party appeals to the U.S. Supreme Court based on a decision regarding state law that clearly and expressly departs from federal law, this Court's standard procedure is to decline review and remand for the state court to have the last word on the issue.

B. Proceedings In The Trial Courts

Petitioner filed his initial Complaint in the Orange County Superior Court, seeking redress against American Express on an "invasion of privacy" claim pursuant to the California Constitution Art 1 § 1 and for non-compliance to § 4053(b)(4) of California SB 1. The Complaint alleges a third claim of liability for fraud, deceit, and non-disclosure for a violation of the disclosure requirements under § 1691(d)(1)-(3) of the federal ECOA.

After proper notice and summons of the Complaint were served upon the defendant(s), American Express, one of the representing entities, American Express Travel Related Services Company, Inc., was entered into default after the company failed to retain counsel by the time the statutory response to the pleading was due. The proposed judgment requested a one-time restitution payment of

("$2500") as a post-deprivation relief for a privacy violation of § 4053(b)(4) of California SB 1. Additionally, the court ordered injunction demanded the company to process the plaintiff's credit card application in compliance with the federal ECOA.

The Respondent, Orange County Superior Court seeking appellate review, has demonstratively refused to honor procedures normally carried out in this court. Multiple filings were delayed or rejected by the clerk (citing trivial reasons); which allowed for key statutory procedural deadlines to be missed in allowing the defendant's counsel to appear untimely in the case to file a notice of motion to demurrer the complaint. The lower trial judge assigned to this case showcased an abuse discretion to withhold the plaintiff from providing a proper opportunity to plead his causes of actions or to provide a post-deprivation remedy in violation of the ECOA. See Pet. App. 13a.

In a brief oral statement (that is without a transcribed record), the superior court judge stated that "permissible purpose was given under the FCRA for American Express to use plaintiff's consumer credit report to plausibly deny him credit, stating that no expectation of informational privacy for the consumer exists in the given circumstances. This legal premise is far from the plaintiff's allegations made in connection with the federal ECOA. No adequate or independent state ground was presented by the judge in the ruling, and the defendants lack any substantial evidence for the demurrer to be sustained.

The argument from the lower court demonstrates that the FCRA presumptions were applied incorrectly to an unrelated provision of California SB 1. In arguing that SB 1 is expressly preempted by federal law, Plaintiffs ('or defendants') must show either that Congress has explicitly defined the extent to which its enactments displace state law. See *English v. Get. Elect. Co.*, 496 U.S. 72, 78-79 (1990).

Furthermore, court records show that the proposed order submitted with plaintiff's entry of default was signed by the judge on December 5, 2025, but notice of this order was issued by the clerk after petitioner's petition for review was denied by the state Supreme Court on April 29, 2026. See Pet. App. 1a. The signed judgment was eventually provided by the court on May 27, 2026 and a notice of entry of judgment or order was filed by the plaintiff to be serviced to the defendants – pending a motion to vacate hearing. The lodged proposed order was apparently signed and issued on December 5, 2025. but court records demonstrate that it was issued (173) days later on May 27, 2026, which was about a month away from the hearing for motion to vacate scheduled by the defendants. Nonetheless, plaintiff moved for ex parte to enforce this judgment through an order to show cause and re: contempt motion. See Pet. App 14a. Motion was denied without any explanation from the trial court judge, once again displaying the court's inability to have the intent to enforce judgment.

A separate complaint was filed in the Orange County Superior Court, addressing the same claims against additional creditors U.S. Bancorp, Wells Fargo, and SoFi Lending Corp. Plaintiff was seeking enforcement of a state constitutional claim, but through an alternative means of procedural administrative remedy through a grant for preliminary injunction. Plaintiff's motion coupled with his complaint, provided a proposed Order to Show Cause and Temporary Restraining Order that would specify the defendants to comply with a state constitutional right of privacy to opt-out the disclosing of his consumer credit report information under California SB 1, during an application for an extension of credit. The order would enjoin the creditors from accessing his consumer credit reports as an opt out request under the federal GLBA and California's SB 1. This motion for preliminary injunction was also denied without proper legal review. The assigned judge does not address the plaintiff's claim for proper review of the adverse action claims in violation of the ECOA. of See Pet. App. 11a.

Subsequently, petitioner filed a petition for a writ of mandate in the appellate court to seek review of the trial court decisions. Writ was denied without opinion or review. And the final state Supreme Court petition for review was denied en banc without proper review. See Pet. App. 1a, 2a.

C. Regulation B's Disclosure Requirements for Providing "Specific Reasons" Under The Federal Equal Credit Opportunity Act

The Equal Credit Opportunity Act ("ECOA") is a landmark civil rights law that protects individuals and businesses against discrimination in accessing and using credit for what is considered "a virtual necessity of life" for most Americans, (S. Rep.No. 94-589, at 3-4 (1976)). In what the Senate drafters called "one of the most important provisions," the amendments provided that "each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor" and that such statement must explain "the specific reasons for the adverse action taken." See 15 U.S.C. § 1691(d)(2)-(3). The amendments defined "adverse action" as "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested." Id. § 1691(d)(6).

This important disclosure requirement "serves two purposes: it discourages discrimination and it educates consumers as to the deficiencies in their credit status." See *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362, 971, 977 (7th Cir. 2004). "Congress described this requirement as 'a strong and necessary adjunct to the antidiscrimination purpose of the legislation, for only if creditors know what they must explain in their decisions will they effectively be discouraged from engaging in discriminatory practices.'" Id. (S. Rep. No. 94-589, at 4).

Therefore, ECOA's information-forcing legislation to prevent discrimination serves several purposes. First, it ensures that individuals and businesses that have been discriminated against will receive substantive information (to which they likely would not otherwise have access to), that might help reveal whether the adverse action was taken on a prohibited basis. "If an applicant never receives notice, it will be difficult to ever determine if another individual is a victim of discrimination. Lenders or financial institutions could pull any type of adverse information from one of the many data furnishing companies to present a false and misleading profile of the applicant's "creditworthiness", without verifying the information for its truthfulness or accuracy.

Subsequently, the notice requirement "fulfills a broader fit need" to allow applicants "to learn where and how their credit status is deficient," something that Congress expected would "have a pervasive and valuable educational benefit to the consumer." Id. (quoting S. Rep. No. 94-589, at 4). "In those cases where the creditor may have acted on misinformation or inadequate information, the statement of reasons gives the applicant a chance to rectify the mistake." Id. (quoting S. Rep. No. 94-589, at 4). In other cases, knowing the reason for the adverse action may allow applicants to take steps to improve their creditworthiness going forward. In either scenario, the disclosure requirement ensures that applicants receive substantive information about the reason for the credit decision that they likely could not obtain otherwise.

To state a plausible claim under 15 U.S.C § 1691(d)(1)-(3), Plaintiff must demonstrate:

1. Respondents, American Express *et al.* are "creditors";
2. Plaintiff, Albert Yum is an "credit applicant";
3. The financial institution or creditor took adverse action with respect to plaintiff's application for credit.
4. The financial institution or creditor failed to provide the applicant with a notification that complied with the ECOA.

Over the past several years, the CFPB has been made aware of this requirement being bypassed by creditors using complex algorithmic underwriting tools to create a false and misleading evaluation of a consumer's "creditworthiness". The "specific reasons" provision of the ECOA is particularly important during these instances because it gives the "credit applicant" full disclosure of where the creditors are accessing this third-party data information from before they are systematically denied credit. (See 12 CFR § 1002.9 comment

9(b)(2)-9). A "credit report" from one of the National Credit Reporting Agencies such as Experian, Transunion, and Equifax; normally do not retain this type of information in a regular "consumer profile."

D. California's Financial Information Privacy Act And The Right To Privacy Granted By The State Constitution

California passed Proposition 11 in 1972, which enumerates "privacy" as a fundamental inalienable right guaranteed by the state constitution. Rightfully, with Congress' enactment of the federal GLBA, California voted on enacting California Financial Information Privacy Act ("SB 1"), to add "financial information" to its list of inalienable privacy rights guaranteed by the state. Although subject to review on a case-by-case basis, this Court has generally recognized, federal rights involving informational privacy are included in the Fifth Amendment Bill of Rights. See *Whalen v. Roe*, 429 U.S. 589 (1977).

The privacy clause under California Constitution Art. 1 § 1 states, "[a]ll people are by nature entitled to a right to privacy." To enforce a private right of action for invasion of privacy, the plaintiff must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. See *Hill v. National Collegiate Athletic Assn.*, 865 P.2d 633, 644, 657 (Cal. 1994).

The key state provision of focus in supplementing the adverse action notice requirements of the federal ECOA is § 4053(b)(4) of California SB 1; which in relevant part states, "[a] financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or a financial service because the consumer has directed pursuant to this subdivision that nonpublic personal information pertaining to him or her not be disclosed". See Pet. App. 17a. The state statute also extends the definition of "non-public personal information" to include any information contained about a person in a "consumer report". Id. § 4052(b)(7).

California's SB 1 and the state constitution "right to privacy" then in-theory, should allow for Californians to subvert the Ninth Circuit's FCRA "consumer credit report" pre-emption clause when a creditor has willfully ignored the federal ECOA's adverse action notice requirements under 15 U.S.C § 1691(d)(1)-(3). When we look at the legislative language of § 4053(b)(4) and try to interpret the intent of the state legislature in drafting this provision, the statutory language and scheme of obtaining a post-deprivation relief, is consistent with a federal discrimination claim made in connection to adverse action notice disclosure requirements under Regulation B of the ECOA.

E. History of the District Court Rulings and Ninth Circuit FCRA Pre-Emption Clause

Shortly after California passed SB 1 in 2004, the American Bankers Association (ABA) and several of its affiliated trade associations filed a lawsuit against the Attorney General of California, and the Commissioner of the Department of Financial Institution and Innovation (DFPI), claiming that SB 1 is completed invalidated through pre-emption of the FCRA. The district court granted summary judgment in favor of the defendants, arguing that section

6807 of the GLBA is clear in permitting states to enact stricter financial privacy laws like SB 1, which confirms Congress' intent to allow more rigorous regulations in how a consumer's "non-public personal information" is used. See *American Bankers Association v. Gould*, 412 F.3d 1081 (9th Cir. 2005)

The district judge reasoned that the Congressional Record for the GLBA, provides reliable evidence for the legislative intent of the "savings clause" because it represents the final statement of the terms agreed to by both houses. Stating, "[on] privacy, states can continue to enact legislation of a higher standard than that of the federal standard." See 145 Cong. Rec. S13913, at S13915 (Nov. 4, 1999). Senator Sarbanes, who authored section 6807 of the federal GLBA dissenting,

> "We were able to include in the conference report an amendment that I proposed which ensures that the Federal Government will not preempt stronger State financial privacy laws that exist now or may be enacted in the future. As a result, States will be free to enact stronger privacy safeguards if they deem it appropriate." (quoting Senator Paul Sarbanes, 145 Cong. Rec. 213788, at S13789 (Nov. 3, 1999)).

The ruling from the Ninth Circuit revealed that California SB 1 is only pre-empted to the extent to comply to § 1681t(b)(2) of the FCRA. On reverse and remand, the district court agreed with the appellate court decision to defer SB 1's affiliate sharing provisions as codified in Cal. Fin. Code § 4053(b)(1) to be preempted by 15 U.S.C. § 1681t(b)(2). Stating, "For the foregoing reasons, we narrow the affiliate-sharing provision of SB1, Cal. Fin. Code § 4053(b)(1), to exclude the regulation of consumer report information as defined by the FCRA, 15 U.S.C. § 1681a(d)(1)." See *American Bankers Association v. Gould*, 412 F.3d 1081 (9th Cir. 2005). Although argued from the plaintiffs that pre-emption meant that the entire clause was severable, the appellate court denied to take such a hyper-technical approach. Our very best indicator of the Legislature's intent — the statute itself — suggests that the Legislature would disfavor sever-ability of the entire clause. See *Kopp v. Fair Political Practices Comm'n*, 905 P.2d 1248, 1290 (Cal. 1995)

REASONS FOR GRANTING CERTIORARI

I. State Procedures Cannot Be Used To Undermine or Defeat A Federal Right

This Court has held that, when a state procedure is inadequate, the state does not violate the plaintiff's due process right unless and until the state fails to remedy that inadequacy. The plaintiff's need to seek state remedies is a requirement to state a procedural due process claim. See *Cotton v. Jackson*, 216, 1328 (2000).

To provide an adequate remedy for an alleged procedural due process violation, a state need not provide all the relief that could be available in a section 1983 claim if it could have compensated the plaintiff for their property losses. Rather, "the state procedure must be able to correct whatever deficiencies exist and to provide plaintiff with whatever process is due." See *McKinney v. Pate*, 20, 1550, (11th Cir. 1994). In any § 1983 action, the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

However, an adequate state remedy does not displace a section 1983 claim; rather it prevents one from appearing in the first place by fulfilling the state's constitutional obligations. Adequacy thus demands that the relief satisfy the Fourteenth Amendment, not section 1983. If the state remedy will pass Fourteenth Amendment scrutiny, any comparison to section 1983 is irrelevant. The Constitution guarantees a constitutional floor of relief, not a floor of relief established by the historical judicial application of a state statute. See *Parratt v. Taylor*, 451 U.S. 527 (1981).

By giving the state a preemptive choice of forum for officials employed under color of law, the "adequacy" standard advances the goals of federalism. Through the provision of adequate post-deprivation remedies, states can avoid federal interference in the operations of their governments tort law systems and thereby maintain their own protections of the rights of their citizens. From the federal perspective (to the extent that the states do provide adequate remedies), the federal court case load is decreased and de-trivialized, promoting efficiency. Respecting the role of the state courts in enforcing the Constitution enhances the federal system rather than undermining it. Should a state choose not to provide adequate remedies, there is no subsequent federal intervention of a prospective or structural nature in the state's legal system. Rather, claims against state officials will continue to be adjudicated in federal court under the Supremacy Clause if the state chooses not to make adequate redress available.

Parratt does not sacrifice the established basic protection of civil rights by having these types of cases into the state courts to be adjudicated under state law. The primary objectives of section 1983 are compensation and deterrence. Although the common law historically serves different purposes and protects different interests than the Constitution and federal civil rights statutes, state-law remedies can further these same objectives when they provide a genuinely adequate means of redress and the challenged conduct does not amount to a substantive due process violation. In particular circumstances, applying common-law principles can effectively compensate injured parties and deter misconduct. A state official is unlikely to feel less constrained from engaging in unlawful conduct simply because accountability will take place in state court rather than federal court.

When confined to its proper scope, Parratt reflects sound principles of federalism. As the Sixth Circuit has noted, "Policy considerations do not require a federal hearing in procedural due process cases that can be corrected in state court." See *Vicory v. Walton*, 721, 1062, 1065 (6th Cir. 1983). Because the federal interest in such cases is limited to ensuring adequate process, an aggrieved party need not seek relief in federal court when state common-law remedies provide sufficient redress.

More broadly, this Court has rejected the notion that every claimant asserting a federal right is entitled to an unrestricted opportunity to litigate that claim in federal district court. In cases involving unauthorized deprivations that do not implicate substantive due process, federal courts have two principal responsibilities. First, they must ensure that state law adequately protects individuals' life, liberty, and property interests against state interference. Second, they must ensure that state procedures do not frustrate the remedies to which plaintiffs are otherwise entitled under state law. These responsibilities correspond to the concepts of procedural adequacy.

II. This Court Holds A Standard of Maintaining Concurrent Jurisdiction By Adjudicating Federal Causes of Action To The Lower Courts

State courts exercise concurrent jurisdiction over a vast range of federal statutory claims and defenses and, in doing so, serve as constitutionally authorized forums for the enforcement of federal law. This holds no exception to the Equal Credit Opportunity Act. The Supremacy Clause presupposes that federal rights adjudicated in the district courts will be resolved with sufficient adequacy to permit meaningful review. Congress designed federal civil rights statutes such as section 1983 to operate uniformly nationwide, to not only be subject to state procedural violations. On occasion, however, where there was "considerable uncertainty as to the precise grounds" for the state decision or the state court did not issue an opinion, this Court has held the standard of vacating the decision and remanding to the state court for further clarification. See *Testa v. Katt,* 330 U.S. 386 (1947).

The full faith and credit clause of the Constitution, as implemented by 28 U.S.C. § 1738, requires that a federal judge apply the state laws that would govern if plaintiff's pending section 1983 suit had been filed in state court. The federal courts, therefore, must apply the former adjudication rules of any state issuing a prior judgment on a claim which is then being re-litigated in federal court. A plaintiff who lost their state claim and seeks to file a claim in, or come back to, federal court is likely to encounter a res judica or collateral estoppel defense. However, state collateral estoppel rules will not be applied where the plaintiff did not have a "full and fair opportunity to litigate" the issue in the first forum.

If the plaintiff loses on his state claim "on the merits" due to adverse findings of fact or mixed fact-law conclusions, collateral estoppel will bar the re-litigation of these issues in federal court (assuming that the plaintiff had a full and fair opportunity to litigate). If, on the other hand, either section 1983 plaintiff loses her state administrative or judicial claim on a strictly legal ground, such as statutes of limitations, lack of jurisdiction, failure to state a claim, or immunity, no problem of res judica or collateral estoppel arises as to the adequacy of the state remedy. Since no disputed facts regarding plaintiff's *prima facie* case have been tried, much less resolved, there can be no issue preclusion. And since under *Parratt* the constitutional due process claim in this context did not arise until the state actually denied the plaintiff a remedy, claim preclusion cannot be used for failure to join the federal claim with the state law action.
Several courts have recognized the inapplicability of former adjudication defenses to this situation. In dismissing section 1983 complaints on adequacy grounds after predicting that state law will make redress available, courts have cautioned that the section 1983 action may be re-instituted if the state denies relief on legal grounds.

III. The Trial Court Made Clear And Erroneous Rulings By Presuming An Improper Legal Standard

This court has traditionally held that trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial, and the second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. See *Weingand v. Atlantic Sav. & Loan Assn.*, 1 Cal.3d 806 (1970).

Failure to grant preliminary injunction goes against this Court's potential abuse of discretion standard of review under the Ninth Circuit's *Winter* factors. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). The first *Winter* factor, likelihood of success, "is a threshold inquiry and is the most important factor" in any motion for a preliminary injunction. That holds especially true for cases where a plaintiff seeks a preliminary injunction because of an alleged constitutional violation. If a plaintiff bringing such a claim shows he is likely to prevail on the merits, that showing will almost always demonstrate he is suffering irreparable harm as well. The deprivation of constitutional rights "unquestionably constitutes irreparable injury". See *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017). Accordingly, when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.

A plaintiff's likelihood of success on the merits of a constitutional claim also tips the merged third and fourth factors decisively in his favor. Because "public interest concerns are implicated when a constitutional right has been violated, ... all citizens have a stake in upholding the Constitution," See *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005), meaning "it is always in the public interest to prevent the violation of a party's constitutional rights," *Elsasser*, 32 F.4th at 731 (quoting *Melendres*, 695 F.3d at 1002); *see also Cal. Chamber of Com.*, 29 F.4th at 482. This court has consistently recognized the significant public interest in upholding constitutional principles. See *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). The government also "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." See *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (holding that the government "cannot suffer harm from an injunction that merely ends an unlawful practice" implicating "constitutional concerns"). Accordingly, we have held that plaintiffs who are able to "establish a likelihood that a policy violates the U.S. Constitution ... have also established that both the public interest and the balance of the equities favor a preliminary injunction." See *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). In sum, because of the importance of the first *Winter* factor in cases where a plaintiff alleges a constitutional injury, it is no surprise that "our caselaw clearly favors granting preliminary injunctions to a plaintiff, who is likely to succeed on the merits of his [constitutional] claim." See *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

If a movant makes a sufficient demonstration on all four *Winter* factors, a court "must not shrink from its obligation to enforce his constitutional rights," regardless of the constitutional right at issue. See *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021). It may not deny a preliminary injunction motion and thereby "allow constitutional violations to continue simply because a remedy would involve intrusion into" an agency's administration of state law. See *Baird v. Bonta*, No. 23-15016 (9th Cir. 2023).

Abuse of discretion may be found when the trial court is vested in the discretion but avoids enforcing, where some unrelated presumption held the standard of review in declining a proper legal remedy. "A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence." See *People v. Cluff* 87 Cal.App.4th 991, 998 (2001). For questions of law subsumed within an argument subject to the abuse of discretion standard, we can wield the benefits of independent review. The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." See *Westside Community Independent Living, Inc. v. Obledo* 33 Cal.3d 348, 355, (1983).

Although the substantial evidence standard for review of a potential abuse of discretion provides a high-level of deference to the trial court, that deference should never be used to shield a lower court ruling from heightened scrutiny and critical examination of determining how the judiciary reached that conclusion. Otherwise, the right to an appellate review of a contested fact-finding determination would be reduced to procedural norms rather than evidentiary substance. An appellate court using the significant evidence test cannot restrict its review to evidence that only supports the respondent. See *People v. Johnson* 26 Cal.3d 557, 577 (1980). The reviewing court must look at the "full record" and determine whether there is substantial evidence to support its rulings. Any explicit and implicit factual conclusions backed by strong evidence, must be deferred back to the trial courts for proper evidentiary review.

IV. An Exhaustion of State Administrative Remedies Do Not Create A Res Judica or Estoppel Effect To Bar This Court As A Federal Forum for Review

Since the res judicata and collateral estoppel effects of state court and federal agency determinations do not attach to a state administrative decision, the exhaustion of state administrative remedies accomplishes this efficient allocation of judicial resources without unduly limiting the litigant's right to a federal forum. Exhaustion of state administrative remedies will not interfere with the exercise of section 1983 rights in those cases in which the deprivation does not take place until the conclusion of the state administrative process.

A litigant's right to enforcement of section 1983 rights in this Court is preserved intact despite an exhaustion requirement because state administrative agency determinations do not create res judicata or collateral estoppel effects. The exhaustion of state administrative remedies postpones rather than precludes the assertion of federal jurisdiction. A section 1983 litigant can pursue his claim in the federal courts after an adverse state administrative decision, and the district court proceeding is an original rather than an appellate proceeding. Although the findings of a state agency are entitled to some deference, they do not create collateral estoppel effects.

Exhaustion of adequate administrative remedies in section 1983 cases allows the state agency to apply its expertise, develop a factual record, and cure its own errors without prejudicing the litigant's right to a federal forum. In Monroe, the Court discussed at length the historical background and the legislative intent of the framers of section 1983. It concluded that the purpose of the Civil Rights Act was three-fold: (1) to override certain kinds of state laws that were inconsistent with federal law; (2) to provide a federal remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy was available in theory but not in practice. One must conclude from this statement of legislative purpose that Congress intended to deny state authorities the opportunity to redress harms in this area only where the state is unable or unwilling to provide a fair and efficacious remedy, See *Monroe v. Pape*, 365 U.S. 167 (1961). Although the state judicial remedy is always inefficacious because its res judicata and collateral estoppel effects jeopardize the litigant's right to a federal forum, the state administrative remedy is subject to no such infirmity, and its adequacy must be judged by its merits.

In short, the legislative intent was not to create a complete substitute for all state remedies, but rather to provide a federal remedy where state remedies are inadequate on their face or in practice, or where a state law, as applied, is inconsistent with federal law. In both situations, cases can arise that require exhaustion for their proper resolution.

IV. This Case Is An Ideal Vehicle

Petitioner's certiorari presents an issue that has not been argued or discussed in any court at the convergence of three different federal consumer laws; the FCRA, ECOA, and the GLBA. The existing Ninth Circuit opinion surrounding the FCRA and its applications to pre-empt certain provisions of California's state version of the federal GLBA, California Financial Information Privacy Act (SB 1), provides a viable framework for how converging state and constitutional privacy laws interact with these federal statutes. An earlier ruling from the circuit affirmed the scope and applicability of "consumer credit reports" as defined by § 1681(d)(1) of the FCRA to pre-empt § 4053(b)(1) of California SB 1. The FCRA grants specific pre-emption under § 1681t(b)(2), so this comes as no surprise. However, under a requirement to provide "specific reasons under the ECOA; pre-emption does not exist for claims made under § 4053(b)(4) of SB 1. The CFPB has discussed this as a particular problem of concern for creditors circumventing these requirements. State administrative remedies were exhausted, making this an ideal case for appellate review.

During instances when an appellate court has not provided meaningful review on a federal claim, this court held the standard of remanding for further clarification. State courts have both the power and the duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction. See *Martin v. Hunter's Lessee,* 14 U.S. 304, 335 (1816).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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