Supreme Court Case No.: S229428

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COORDINATION PROCEEDING SPECIAL TITLE (RULE 3.550)
FIRST STUDENT, INC. CASES

After a Decision by the Court of Appeal, Second Appellate District
Case No. B256075

FIRST STUDENT, INC. AND FIRST TRANSIT, INC.'S OPENING BRIEF ON THE MERITS

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I.

STATEMENT OF ISSUES PRESENTED FOR REVIEW.

Is the Investigative Consumer Reporting Agencies Act (Cal. Civ. Code, § 1786 *et seq.*) unconstitutionally vague as applied to background checks conducted on a company's employees, because persons and entities subject to both that Act and the Consumer Credit Reporting Agencies Act ("CCRAA") (Cal. Civ. Code, §1785.1 et seq.) cannot determine which statute applies?

II.

INTRODUCTION

It is well-established that all statutes requiring or prohibiting an act must describe what is required or prohibited in terms that put a party on notice of what the statute requires. This due process requirement is at the core of any statute. A statute violates this core tenant of due process when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391.

A *fortiori* of this due process requirement is that a statute that purports to prohibit conduct permitted by another separate and distinct statute violates due process. A statute is unconstitutionally vague when it purports to make illegal conduct expressly permitted by another separate and distinct statute. Respondent Eileen Connor however, attempts to do just that by claiming First Student, Inc. ("First") violated California's Investigative Consumer Reporting Agencies Act (the "ICRAA") when it procured and/or caused to be prepared a consumer report (*i.e.* a background report) on her in complete compliance with the separate and distinct statute, California's Consumer Reporting Agencies Act (the "CCRAA").

The Second Appellate District below held, contrary to two decisions of the Fourth Appellate District in *Ortiz v. Lyon Management Group, Inc.* (2007)

157 Cal.App.4th 604 and *Trujillo v. First American Registry* (2007) 157 Cal. App. 4th 628, that a party who obtains a consumer report as authorized by the CCRAA and in complete compliance with its requirements can be held potentially liable for the ICRAA's $10,000 penalty if the background report is determined to be simultaneously subject to both the CCRAA and the ICRAA. The Court did so because it concluded there is nothing preventing First, or any other individual or entity that procures or causes to be prepared a consumer report, from complying with both statutes at the same time.

As demonstrated below, the Second District's analysis is fundamentally flawed. Whether the ICRAA is unconstitutionally vague as applied to the background reports does not hinge on whether it is possible to comply with the ICRAA and the CCRAA at the same time. Rather, the determinative issue is whether the ICRAA provided First notice it had to comply with the ICRAA when requesting a consumer report on Ms. Connor in a manner expressly authorized by the CCRAA. Put simply, is the ICRAA unconstitutionally vague when it purports to make unlawful conduct expressly lawful under the separate and distinct statute, the CCRAA. As the Fourth Appellate District held in *Ortiz* and *Trujillo*, it is.

It is undisputed that First's conduct was permitted under the CCRAA. The CCRAA allows employers to obtain background reports for employment purposes – *i.e.* for use in "evaluating a consumer for employment, promotion, reassignment, or retention as an employee." Indeed, prior to the ICRAA's 1998 amendment, in which the Legislature expanded the ICRAA's scope by changing its definition of what types of consumer reports were subject to its provisions, the CCRAA and not the ICRAA governed background reports obtained for employment related purposes so long as they did not contain information expressly excluded from the CCRAA's provisions – i.e. "information solely on a consumer's character, general reputation, personal characteristics, or mode of living which [is] obtained through personal interviews with neighbors, friends, or associates of the consumer reported on, or others with whom he or she

is acquainted or who may have knowledge concerning any of these items of information."

It is also undisputed that First complied with the CCRAA when it obtained the background reports on Ms. Connor that are the subject of this lawsuit. Ms. Connor is a former employee of First. During her employment, First requested HireRight Solutions prepare three background reports on her between 2007 and 2010. It is also undisputed that First used these reports for an employment purpose - *i.e.* to evaluate Ms. Connor for promotion, reassignment, or retention as an employee. It is also undisputed that, before First requested each of these reports, it sent Ms. Connor a notice containing all of the pre-request disclosures the CCRAA requires. None of the information in the background reports fell outside the CCRAA's exclusive jurisdiction – *i.e.* they contained no information obtained through personal interviews.

Although CCRAA expressly permitted First to obtain these background reports and First did so in complete compliance with its terms, Ms. Connor argues the CCRAA is irrelevant to this action. She makes the meritless contention that First was required, but failed, to comply with the ICRAA's more stringent requirements before it could properly request these background reports. Ms. Connor's attempt to hold First liable for the ICRAA's $10,000 penalty for requesting a background report, as authorized by the CCRAA, is based on the unconstitutional overlap created by California's Legislature's amendment to the ICRAA in 1998. This overlap caused the ICRAA to be unconstitutionally vague as applied to the background reports at issue.

Specifically, in 1975, California's Legislature established the ICRAA to govern "investigative consumer reports" containing "character" information. Also in 1975, the Legislature created CCRAA, a related but independent statute to separately govern "consumer credit reports" containing "creditworthiness" information. Until 1998, this deliberate separation between the ICRAA and CCRAA was achieved by defining an investigative consumer report

as a report compiled from information obtained by "personal interviews," and by excluding such reports from the CCRAA's definition of a consumer credit report.

In 1998, the Legislature expanded the ICRAA's definition of an investigative consumer report to include reports compiled from character information obtained "through any means." As a result, determining whether the ICRAA or CCRAA applies now depends on the type of information in a background report (*i.e.*, whether it is character or creditworthiness information), and no longer depends on the method for collecting information (*i.e.*, whether it was collected by personal interviews or by other means).

However, starting with *Ortiz,* 157 Cal.App.4th at 604, courts have repeatedly rejected this character-creditworthiness distinction as sufficient to differentiate the ICRAA and CCRAA "as applied" to background reports containing information that can be classified both as character and creditworthiness information (*e.g.*, criminal records). In such cases, as the *Ortiz* court explained, this uncertainty is fatal to the ICRAA because the ICRAA imposes stricter duties and provides much more generous remedies than the CCRAA (*e.g.*, the statutory damages available under the ICRAA ($10,000) are four times greater than the statutory damages available under the CCRAA ($2,500)). Civ. Code §§ 1785.31, 1786.53.

The logic and reasoning of *Ortiz* and other cases that have considered this issue compel reversal of the Second Appellate District's decision because the subject background reports contain information that can be simultaneously classified both as character and creditworthiness information (*e.g.*, criminal records). Since the ICRAA's 1998 amendment, it is impossible for a party to determine whether a consumer report, such as the subject background reports, is subject to the CCRAA or the ICRAA. The ICRAA therefore fails to provide proper notice of its requirements and is unconstitutionally vague.

Ms. Connor's arguments to the contrary are without merit. They are all based on her contention that the CCRAA and the ICRAA are companion

statutes and do not unconstitutionally overlap. While the statutes are in *pari materia*, the Legislature has always intended each govern and apply to different types of consumer reports. As stated above, prior to 1998, their distinction was readily apparent based on the manner the information in a report was obtained. Since 1998, however, this distinction no longer exists. It is now impossible to determine whether one statute or the other applies to background reports used for employment purposes containing information covered by both.

No legal authority has been identified supporting the proposition that a party can be held legally liable for violating one statute when engaging in conduct specifically authorized by another. Rather, Ms. Connor and the Court below relied on inapposite authority, including authority stating no constitutional issue is presented where a defendant simultaneously violates two statutes that prohibit the same conduct but provide different penalties. However, the CCRAA and the ICRAA do not simply provide different penalties. Rather, each ascribes very different substantive and procedural obligations relating to consent and disclosure, which are at the center of the allegations in this case. Moreover, the undisputed facts establish that First complied with the CCRAA.

For these reasons, First respectfully requests the Court affirm the decisions of the Fourth Appellate District in *Ortiz* and *Trujillo* finding the ICRAA, as a result of the 1998 amendment, is unconstitutionally vague as applied to consumer reports that are simultaneously subject to both the CCRAA and the ICRAA and reverse the Second Appellate District's decision in this case.

III.

FACTUAL BACKGROUND

A. The Parties.

1. First Student, Inc./First Transit, Inc.

First is a subsidiary of FirstGroup America, which is a subsidiary of FirstGroup PLC. First is a leader in providing safe, reliable, and cost-effective

transportation services to school districts throughout the United States and Canada. (JA, Vol. I, p. 37.) First provides its services through a fleet of over 54,000 buses that serve approximately 6 million student riders each day. Because First provides transportation services for our most precious cargo, our children, it places a profound emphasis on making sure its services are conducted as safely as humanly possible. It does this by, *inter alia*, conducting background checks on all of its drivers and others who have contact with its riders to ensure they are properly qualified to safely perform their job duties.

2. HireRight Solutions, Inc.

HireRight Solutions is a consumer reporting agency. Ms. Connor claims HireRight Solutions is the successor entity to USIS. (JA, Vol. I, pp. 37-38.) While USIS was the entity that performed the background checks at issue, Ms. Connor claims HireRight Solutions is legally liable for USIS' alleged improper conduct. (*Id.*)

3. Respondent Eileen Connor.

Respondent Eileen Connor is a former First employee on who First requested HireRight Solutions prepare the subject background reports. (JA, Vol. I, pp. 162-163.)

B. FirstGroup PLC, Acquires Laidlaw International, Inc.

In October 2007, FirstGroup PLC acquired Laidlaw Transit (another transportation company) through a stock purchase agreement. (JA, Vol. I, p. 37.) As a result, certain employees who had been employed by Laidlaw became employees of First. (JA, Vol. I, pp. 37-38.) To confirm these Laidlaw employees were properly qualified to work in positions in which they would have contact with First's student passengers, First ordered background reports on these individuals from HireRight Solutions. (*Id.*)

C. First Requests HireRight Solutions Perform Background Checks On Certain Former Laidlaw Employees Including Respondent.

Beginning in late October 2007, and in conjunction with its efforts to transition the former Laidlaw employees to First and confirm they were properly qualified to work with children, First sent each Laidlaw employee a package of documents called a "Safety Pack." (JA, Vol. I, p. 166.) As pertinent to this action, the Safety Pack included a written notice/disclosure/authorization ("Notice") allowing First to procure or cause to be prepared a consumer report(s) and/or an "investigative consumer report(s)" on the individual. (JA, Vol. I, pp. 37.) The Notice stated, in pertinent part:

> In connection with your employment or application for employment (including contract for services), an investigative consumer report and consumer reports, which may contain public record information, may be requested from USIS [HireRight Solutions]. . . . These reports may include the following types of information: names and dates of previous employers, reason for termination of employment, work experience, accident, academic history, professional credentials, drugs/alcohol use, information relating to your character, general reputation, educational background, or any other information about you which may reflect upon your potential for employment gathered from any individual, organization, entity, agency, or other source which may have knowledge concerning any such items of information. Such reports may contain public record information concerning your driving record, workers' compensation claims, criminal records, etc., from federal, state and other agencies which maintain such records; as well as information from USIS [i.e. HireRight Solutions] concerning previous driving records requests made by others from such state agencies.

(JA, Vol. V, pp. 1072-1073.)

The notice also contained a box that the individual could check to "request to receive a free copy of any consumer report (*i.e.* background report) ordered" on him/her. (*Id.*)

D. The Background Checks At Issue In This Action.

Depending on the specific searches First requested, HireRight Solutions would prepare one or more of the following reports to be included in the background report: (1) a report entitled USIS Widescreen report; (2) a report on the results of searches of criminal records located in the county where the individual lived/worked; (3) a report of a nationwide search of sex offender databases; (4) an address history report based on the individual's Social Security number; and (5) a driver's license history report referred to as a MVR Report. (JA, Vol. I, pp. 175-180.) Besides the foregoing, and while not used as part of the background reports for individuals transitioning from Laidlaw to First, at times, First would also request HireRight Solutions prepare an employment verification report. (*Id.*)

As pertinent to Ms. Connor's action, it is undisputed that none of her background reports contained any information obtained through personal interviews. (JA, Vol. I, pp. 175-180; Vol. IV, pp. 951-952.) Rather, these reports were all comprised of information obtained from HireRight Solutions' proprietary databases and publically available information. (JA, Vol. I, pp. 175-180.) For example:

- The USIS Widescreen Report. HireRight Solutions prepares this report by reviewing a proprietary database it maintains that compiles information from prior criminal record checks for the subject of the background check to identify counties to be searched. It then searches specific public records on the individual in those counties.

- County Criminal Record Report. The county criminal records search is conducted by reviewing the publically available records in the criminal courthouses in the specific counties searched.

- Sex Offender Report. The sex offender report is prepared by searching available sex offender registries nationwide.

- Address History Report. The address history report is prepared by reviewing electronic databases to identify which counties the individual lived based on his or her Social Security number. Like the Widescreen Report, this report is prepared to identify in which counties the county criminal record searches should be conducted.

- The MVR Report. The MVR driver's license check is conducted by submitting a request to the state for a copy of the subject's driving records.

- Social Security Number Check. The Social Security number check is conducted by comparing the individual's social security number to a table provided by the Social Security Administration that tells, based on a number range, the location where the number was issued and whether the individual with that number has been reported as deceased.

- Employment Verification Report. The employment verification report is, at times, prepared by contacting a database provider and, at other times, prepared by contacting the individual's former employers, which are identified by the employee in his/her employment application. It is prepared to confirm the information the individual provided on his/her employment application.

(JA, Vol. I, pp. 175-180.)

E. Ms. Connor's Employment With Laidlaw/First.

Ms. Connor started working for Laidlaw in about 2000, as a school bus driver's aide. (JA, Vol. I, pp. 185-186, 187-189.) In this position, she assisted the driver supervising the children riding the bus. (*Id.* at pp. 185-186.) In about 2002, she applied to be a school bus driver. (*Id.* at pp. 189-190.) Ms. Connor went through the driver training and certification requirements, including the Department of Justice background check, and earned her school bus driver's

license endorsement. (*Id.*) She thereafter worked for Laidlaw as a school bus driver until Laidlaw was acquired by First. (*Id.* at pp. 162, 185-186, 187-189.)

After First acquired Laidlaw in October 2007, it sent Ms. Connor the Safety Pack, which included the Notice. (*Id.* at p. 166.) After it did, First requested HireRight Solutions prepare a background report on her. The background report First requested comprised the: (1) USIS Widescreen report; (2) criminal records report; (3) sex offender report; (4) address history report; and (5) an employment verification report for the employers Ms. Connor listed in her employment application, i.e. "Laidlaw Transit" and "First Student." This report was prepared by using electronic databases and was based on publically available information and contained no information obtained from personal interviews. (JA, Vol. I, pp. 198-206; JA, Vol. II, pp. 951-952.)

Ms. Connor worked as a school bus driver for First until March 2009. (JA, Vol. I, pp. 189-190.) By March 2009, she had been involved in several traffic accidents and First contemplated terminating her employment. (*Id.*) Rather than fire her, First allowed Ms. Connor to return to work as a school bus driver's aide. (*Id.*) In connection with returning to work in this position, Ms. Connor had to fill out an employment application and execute a new Notice. (*Id.*) She filled out these documents on March 16, 2009 (the employment application) and March 18, 2009 (the Notice). (JA, Vol. I, pp. 208-213.)

On March 18, 2009, and in connection with Ms. Connor returning to work as a driver's aide, First requested HireRight Solutions prepare a new background report on her. (JA, Vol. I, pp. 215-228.) This background report comprised: (1) the USIS Widescreen report; (2) the criminal records report; (3) the sex offender report; (4) the address history report; and (5) an employment verification report for the employers she listed in her employment application, specifically "Laidlaw Transit" and "First Student." (*Id.*) On November 19, 2009, First requested HireRight Solutions prepare a driver's license report, the MVR report on her. (*Id.*) As with her initial background report, this report was prepared

by using electronic databases and was based on publically available information and contained no information from personal interviews or from non-public sources. (JA, Vol. IV, pp. 951-952.)

First requested HireRight Solutions perform a new background check on Ms. Connor on June 1, 2010. (JA, Vol. I, pp. 232-244.) While not required, she signed another Notice in conjunction with this background report. (JA, Vol. I, p. 230.) As with her prior background report, First requested HireRight Solutions prepare a: (1) USIS Widescreen report; (2) criminal records report; (3) sex offender report; (4) address history report; and (5) an employment verification report for the employers she listed in her March 2009, employment application. (JA, Vol. I, pp. 232-244.) Again, as with her prior background reports, this report was prepared by using electronic databases and contained no information obtained from non-public sources. (JA, Vol. VI, pp. 951-952.)

It is undisputed Ms. Connor passed the background check and suffered no adverse employment action from First as a result of any information contained in the report. (JA, Vol. I, p. 162.) Despite acknowledging she signed the second and third Notices on March 18, 2009, and June 1, 2010, to this day she does not know if First ever conducted a background check on her. (JA, Vol. I, pp. 191.)

Ms. Connor claims to have suffered non-economic damages comprising a little anger and "a little distress[]" at the possibility that First conducted a background check on her without asking. (*Id.*) Given that First consistently and repeatedly told her it would be performing such checks before they were done and provided her a Notice before performing such check, she probably did not suffer, or can establish she suffered any legally compensable damages because of these background checks.

F. Statutory History Of The CCRAA And ICRAA Underlying The Parties Dispute.

In 1970, California's Legislature enacted legislation regulating the consumer credit reporting industry, the Consumer Credit Reporting Act (former Civ. Code § 1785.1 et seq.) Stats. 1970, c. 1348, p. 2512, § 1, repealed by Stats. 1975, c. 1271, 0.3377, § 2. The Consumer Credit Reporting Act governed "credit rating reports" it defined to include a report regarding a consumer's "credit record, credit standing, or capacity."

Later the same year, Congress passed the federal Fair Credit Reporting Act ("FCRA") (15 U.S.C. § 1681 *et seq.*). The FCRA broadly defined the term "consumer report" to include information bearing on an individual's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d). The FCRA also differentiated between consumer reports containing information obtained by "personal interviews" (defined by the FCRA as "investigative consumer reports") and consumer reports that did not contain such personal interview information. Id. at § 1681a(e).

In 1975, California's Legislature repealed the Consumer Credit Reporting Act and separately passed two new separate and distinct laws: the CCRAA and the ICRAA. Stats. 1975, c, 1271, p. 3369, § 1 ("CCRAA"); Stats 1975, c. 1272, p. 3378, § 1 ("ICRAA"). The structure of the CCRAA and the ICRAA varied considerably from the structure of the FCRA, and reflected the Legislature's intent to establish two separate and independent statutes governing consumer reports regulating only those reports specifically falling within their specific spheres. (*Id.*)

While the CCRAA and ICRAA both allowed the preparation and use of consumer reports falling under their respective jurisdictions for "employment purposes," which they both defined as "for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee," they

specifically differentiated between the types of consumer reports subject to their respective provisions by the manner in which the information in the report was obtained. Compare Cal. Civ. Code §§ 1785.3(c), (f), with Cal. Civ. Code §§ 1786.2(c), (f), Stats 1998, c. 988, § 1.

The CCRAA applied to all consumer reports, unless they were specifically covered by the ICRAA. Compare Cal. Civ. Code § 1785.3(c) with Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1. As enacted by Assembly Bill 600, the CCRAA defined a consumer report falling under its provisions, i.e. a "consumer credit report," as one containing any "information bearing on a consumer's credit worthiness, credit standing, or credit capacity." Hist. and Statutory Notes, Civ. Code § 1785.3(c); see also Cal. Civ. Code § 1785.3(c). Significantly, the CCRAA excluded from its coverage consumer reports that were covered by the ICRAA. It did so by excluding consumer reports:

> Containing information solely on a consumer's character, general reputation, personal characteristics, or mode of living which is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on, or others with whom he is acquainted or who may have knowledge concerning those items of information.

Cal. Civ. Code § 1785.3(c).

The ICRAA on the other hand, as originally enacted, was much more limited in scope. It only applied to consumer reports it called "investigative consumer report[s]," which it defined as one "in which the information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews." Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1.

As the foregoing shows, the ICRAA defined consumer reports falling under its jurisdiction as being those that were specifically excluded from the CCRAA. Compare Cal. Civ. Code § 1785.3(c), with Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1. In other words, when enacted, the CCRAA

covered all consumer reports, including consumer reports containing information "on a consumer's character, general reputation, personal characteristics, or mode of living" so long as the information was not obtained through personal interviews, while the ICRAA covered consumer reports containing information on a consumer's character obtained through such personal interviews. *Id.* This bright line distinction existed until the Legislature amended the ICRAA in 1998.

G. The California Appellate Court Second District's Decision In Cisneros v. *U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548.

In 1995, California's Court of Appeal, Second District, decided *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548. The *Cisneros* Court interpreted the ICRAA's "personal interview" requirement as meaning, and being limited to, situations where information in an investigative consumer report is obtained from direct communication between two or more persons – *i.e.* "in person interviews" - and did not apply to information gathered in other ways, such as from written surveys or reports. *Id.* at 569.

The *Cisneros* plaintiffs alleged the defendant, a company that collected and sold information to landlords regarding potential renters, violated the ICRAA by sending forms to a potential renter's former landlord asking them to report the manner in which a tenant's tenancy ended. *Id.* at 567. The Court held the defendant's conduct did not violate the ICRAA because its reports were "not 'investigative consumer reports' because the information [in the report] is not obtained through 'personal interviews'" as the ICRAA required. *Id.* at 569. Rather, the information was obtained from the forms, which the prior landlord filled out based on their own personal observations - not on "personal interviews." *Id.* at 567-569.

H. California's Legislature's 1998 Amendments To The ICRAA.

In 1998, California's Legislature amended the ICRAA by revising its definition of an "investigative consumer report." Stats. 1998, c. 998 (S.B. 1454), § 1. It also amended the penalty available for a proven violation. *Id.* The

amendment changed the ICRAA's definition of an "investigative consumer report" as being one "whose information is "obtained through personal interviews" to being one whose information is "obtained through any means." See Hist. and Statutory Notes, Civ. Code § 1786.2(c). The amended definition, which was in place at the time period relevant to this action and today, states:

> The term "investigative consumer report" means a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means.

Cal. Civ. Code § 1786.2(c).

Significantly, the Legislature made no corresponding amendments to the CCRAA. Indeed, the CCRAA today still applies to all consumer reports except those:

> Containing information solely on a consumer's character, general reputation, personal characteristics, or mode of living, which is obtained through personal interviews . . . .

Cal. Civ. Code § 1785.3(c)(5).

I. Procedural Requirements To Request A Consumer Report Under The CCRAA And The ICRAA And Penalties For A Proven Violation.

While the CCRAA and the ICRAA both authorize an employer to obtain a consumer report for "employment purposes," the CCRAA and the ICRAA impose significantly different procedural requirements to do so and provide significantly different penalties for a proven violation.

During the time period relevant to this action, the CCRAA required the requesting party:

1. Inform "the person [in writing] that a report will be used";
2. State "the source of the report"; and
3. Give the subject of the report a form "contain[ing] a box that the person may check off to receive a copy of the [] report."

See Cal. Civ. Code § 1785.20.5(a), Historical and Statutory Notes, Stats.2011, c. 724.

The ICRAA however, requires the requesting party:

1. Provide the subject of the report a written disclosure:
   a. Stating an investigative consumer report may be obtained;
   b. Identifying the permissible purpose of the report;
   c. Stating the report may include information on the consumer's character, general reputation, personal characteristics, and mode of living;
   d. Identifying the name, address, and telephone number of the investigative consumer reporting agency preparing the report; and
   e. Notifying the consumer in writing of the nature and scope of the investigation requested, including a summary of the provisions of California Civil Code section 1786.22; and
2. The Consumer authorizes the preparation and procurement of the report in writing.

Cal. Civ. Code § 1786.16(a).

The CCRAA and the ICRAA also provide significantly different penalties for a proven violation of their provisions. The CCRAA authorizes an aggrieved party to recover:

- In the case of a negligent violation, actual damages, including court costs, loss of wages, attorneys' fees and, when applicable, pain and suffering; or

- In the case of a willful violation, actual damages incurred as set forth above and punitive damages of not less than one hundred dollars ($100) nor more than five thousand dollars ($5,000) for each violation as the court deems proper.

Cal. Civ. Code § 1785.31.

The ICRAA states an aggrieved party may recover:

- Any actual damages sustained by the consumer or ten thousand dollars ($10,000), whichever sum is greater, plus their attorneys' fees and court costs; as well as punitive damages if the defendant's conduct is established to be grossly negligent or willful.

Cal. Civ. Code §§ 1786.50(a), (b).

J. In 2011, California's Legislature Amends The CCRAA And Adds The New Statute California Labor Code Section 1024.5.

In 2011, California's Legislature again showed its intent that the CCRAA and the ICRAA, while applying to the same subject matter, are intended to be separate and distinct statutes. The Legislature amended the CCRAA in 2011, and purported to limit the situations a report could be requested for employment purposes. Pre 2011, the CCRAA stated, in pertinent part:

> Prior to requesting a consumer credit report for employment purposes, the user of the report shall provide written notice to the person informed. The notice shall inform the person that a report will be used, and the source of the report, and shall contain a box that the person may check off to receive a copy of the credit report.

Cal. Civ. Code § 1785.20.5(a), Historical and Statutory Notes, Stats. 2011, c. 724.

The Legislature amended this statute in 2011, to now read:

> Prior to requesting a consumer credit report for employment purposes, the user of the report shall provide written notice to the person informed. The notice shall inform the person that a report will be used, and shall identify the specific basis under subdivision (a) of Section 1024.5 of the Labor Code for use of the report. The notice shall also inform the person of the source of the report, and shall contain a box that the person may check off to receive a copy of the credit report.

Cal. Civ. Code § 1785.20.5(a).

At the same time, the Legislature also passed Labor Code section 1024.5. This statute states, in pertinent part:

> An employer or prospective employer shall not use a consumer credit report for employment purposes unless the position of the person for whom the report is sought is any of the following [listing permissible uses of a consumer report issued in the CCRAA for an employment purpose].

Cal. Labor Code § 2014.5(a).

Section 1024.5 goes onto enumerate eight (8) positions for which a consumer credit report can be procured for an employment purpose. *Id.*

It is against this backdrop that Ms. Connor's action against First is brought.

K. Ms. Connor's Lawsuit.

This mass action was initiated in October 2009. Interestingly, it comprises 24 separately filed actions, each with under 100 plaintiffs. It was apparently structured in this manner to attempt to avoid the ICRAA's bar against plaintiffs claiming its $10,000 statutory penalty in a class action. See Cal. Civ. Code § 1786.50(a)(1).

Ms. Connor and the other Plaintiffs amended their Complaints several times throughout the proceedings. At the time First filed its motion for summary judgment, the operative complaint was the Consolidated Fourth Amended Complaint ("CFAC"). The CFAC asserted four causes of action against First for alleged violations of the ICRAA (the First, Second, Sixth, and Seventh Causes of Action). (JA, Vol. I, pp. 34-90.) Each of these causes of action was premised on the same allegations, that First procured or caused to be prepared "investigative consumer reports," as defined in the ICRAA, on her without providing her the requisite disclosures and/or obtaining her written consent. (*Id.* at pp. 36-39.) The only distinction between the causes of action is that the First and Sixth Causes of Action allege Ms. Connor suffered some unidentified emotional distress damages and the Second and Seventh Causes of Action do not. (Id. at pp. 41-53.)

IV.

PROCEEDINGS BELOW

First filed its motion for summary judgment on August 5, 2013. On December 18, 2013, the trial court granted First's motion finding "the ICRAA is unconstitutionally vague and unenforceable as applied to Plaintiff's claims against First Student, Inc. and First Transit Inc." pursuant to *Ortiz,* 157 Cal.App.4th at 604 and *Trujillo*, 157 Cal.App.4th at 628. (JA, Vol. X, p. 2298.)

The trial court's decision was based on Ms. Connor's failure to produce evidence that "[t]he background reports that First Student, Inc. procured and/or caused to be prepared on Plaintiff [contained] any information obtained through personal interviews." (*Id.* at p. 2298:24-27.) Accordingly, the trial court correctly found Ms. Connor's subject background reports were simultaneously subject to both the CCRAA and the ICRAA. *Id.* Because the CCRAA and the ICRAA contain different procedural requirements before a consumer report can be requested and contain significantly different penalties for violating their provisions, the trial court correctly found their simultaneous coverage caused the ICRAA to be unconstitutionally vague and unenforceable as applied to this action as a matter of law. *Id.*

On appeal, the Second Appellate District reversed. It held the ICRAA is not unconstitutionally vague because "there is no 'positive repugnancy' between the CCRAA and the ICRAA." *Connor v. First Student, Inc.* (2015) 239 Cal. App. 4th 526, 538. The Court held "[a]n agency that furnishes a report containing both creditworthiness information and character information and the person who procures or causes that report to be made, can comply with each act without violating the other." *Id.*

In ruling as it did, the Second Appellate District created an actual conflict between it and the Fourth Appellate District regarding the constitutionality of the post 1998 amendment ICRAA and whether its overlap with the CCRAA

renders it unconstitutionally vague as applied to the background reports at issue. See *Connor*, 239 Cal.App.4th at 526; *Ortiz,* 157 Cal.App.4th at 604; *Trujillo*, 157 Cal.App.4th at 628; see also *Roe v. LexisNexis Risk Solutions, Inc.* (C.D. Cal. 2013) 2013 U.S. Dist. LEXIS 88936,*14-18; *Moran v. The Screening Pros.* (C.D. Cal. 2012) 2012 U.S. Dist. LEXIS 158598,*15-22.

V.

LEGAL ARGUMENT

The ICRAA is unconstitutionally vague as applied to the background reports First obtained on Ms. Connor because it failed to provide First any notice that an individual or entity lawfully requesting a background report in complete compliance with the CCRAA needs to also comply with the ICRAA's more stringent requirements. As a result, an individual or entity that lawfully complies with the CCRAA may be subject to the ICRAA's $10,000 penalty. It cannot be the law that First can be potentially held liable for a $10,000 penalty for engaging in completely legal activity. This Court should therefore reverse the Second Appellate District's decision.

A. Legal Standard For Determining Whether A Statute Is Unconstitutionally Vague.

"The void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts*, (1984) 468 U.S. At 629; *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391. "[T]he underlying concern [of a vagueness challenge] is the core due process requirement of adequate notice." *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115. A vague statute cannot be upheld because "'we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763. "A statute should be sufficiently certain so that a person may

know what is prohibited thereby and what may be done without violating its provisions . . . ." *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484.

Statutes in *pari materia* must also be read to harmonize them with one another, *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4; *Dyna-Med v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387, and be construed to "give effect to all." Cal. Civ. Code § 1858; Ortiz, 157 Cal.App.4th at 615.

To determine whether a statute is unconstitutionally vague, it must be "applied in a specific context." *Gallo*, 14 Cal.4th at 1116. Thus, "in judging the constitutionality of [a statute] we must determine not whether [it] is vague in the abstract but, rather, whether it is vague as applied to this appellant's conduct in light of the specific facts of this particular case." *Cranston*, 40 Cal.3d at 765. The challenged statute need only be reasonably certain or specific. *Gallo*, 14 Cal.4th at 1117. It "cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." *Lockheed*, 28 Cal.2d at 484. Finally, "[a]ll presumptions and intendments favor the validity of a statute . . . ." *Id.* Applying this standard to the ICRAA in this action establishes it is unconstitutionally vague and unenforceable.

B. California's Legislature Intended The CCRAA And The ICRAA To Be Separate And Distinct Statutes When Originally Enacted.

Since their inception, the CCRAA and the ICRAA were intended to apply to different and distinct consumer reports and not overlap so an individual or entity requesting a consumer report had to comply with both statutes. The Legislative history of the two statutes make this intentional separation clear.

In 1970, the California Legislature passed legislation that regulated the consumer credit reporting industry, the Consumer Credit Reporting Act (former Civ. Code § 1785.1 et seq.). Stats. 1970, c. 1348, p. 2512, § 1, repealed by Stats. 1975, c. 1271, 0. 3377, § 2. The Act governed "credit rating reports" and

defined that term to include a report regarding a consumer's "credit record, credit standing, or capacity."

Later that same year, Congress passed the federal Fair Credit Reporting Act ("FCRA") (15 U.S.C. § 1681 et seq.) The FCRA broadly defined the term "consumer report" to include information bearing on an individual's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d). The FCRA also included provisions governing screening reports compiled from information obtained by "personal interviews" (defined by the FCRA as "investigative consumer reports"). *Id.* at § 1681a(e).

In 1975, the California Legislature repealed the Consumer Credit Reporting Act and passed two new laws: the ICRAA and the CCRAA. Stats. 1975, c. 1272, p. 3378, § 1 (ICRAA); Stats. 1975, c. 1271, p. 3369, § 1 (CCRAA). The structure of the new California laws varied considerably from the structure of the FCRA, and reflected the Legislature's intent to establish two independent statutes. As an initial matter, whereas the FCRA defined an "investigative consumer report" as a type of "consumer report," the ICRAA was established to independently govern only investigative consumer reports (i.e., screening reports compiled based on information from personal interviews). Second, whereas the FCRA's definition of a "consumer report" encompassed information bearing on any of seven specified factors (*i.e.*, credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living), the CCRAA was established to independently govern the first three factors (credit worthiness, credit standing and credit capacity) and the ICRAA was established to independently govern the other four factors (character, general reputation, personal characteristics and mode of living).

The original statutory definitions in the ICRAA and CCRAA reflected this deliberate separation. As enacted by Assembly Bill 601, the ICRAA defined an "investigative consumer report" as one "in which information on a

consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews," and excluded from its coverage creditworthiness information. Hist. and Statutory Notes, Civ. Code § 1786.2(c) (emphasis added). As enacted by Assembly Bill 600, the CCRAA defined a "consumer credit report" as one containing "information bearing on a consumer's credit worthiness, credit standing, or credit capacity," and excluded from its coverage reports containing character information obtained through personal interviews. Hist. and Statutory Notes, Civ. Code § 1785.3(c).

The foregoing establishes California's Legislature intended the CCRAA and the ICRAA to be separate and distinct statutes and apply to separate consumer reports from their inception. Indeed, other than intending they be in *pari materia* and touch on the same subject – a background report's preparation and procurement – the Legislature intended they apply to different types of reports based on the sources of the information contained in them.

It is undisputed that the CCRAA and the ICRAA both apply to consumer reports that are procured and prepared for "employment purposes." Cal. Civ. Code §§ 1785.3(f), 1786.2(f). It also cannot be disputed that both statutes define an "employment purpose" the same way - a report "used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee." Cal. Civ. Code §§ 1785.3(f), 1786.2(f). Moreover, it is also without dispute that, when originally enacted, the CCRAA and the ICRAA differentiated between "consumer reports" obtained for employment purposes subject to their provisions by differentiating between the manner by which the information in a report was obtained.

For example, the CCRAA originally defined, and continues to define today, a consumer report subject to its provisions as one containing any "information bearing on a consumer's credit worthiness, credit standing, or credit capacity" and excludes reports:

> Containing information solely on a consumer's character, general reputation, personal characteristics, or mode of living which is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on, or others with whom he is acquainted or who may have knowledge concerning those items of information.

Cal. Civ. Code § 1785.3(c).

When originally enacted, the ICRAA defined a consumer report falling under its jurisdiction as being one "in which the information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews." Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1.

Significantly, as the foregoing demonstrates, prior to 1998, the CCRAA and the ICRAA's respective definitions specifically excluded consumer reports that were subject to the others provisions. Compare Cal. Civ. Code § 1785.3(c) with Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1; Ortiz, 157 Cal.App.4th at 614. Ms. Connor does not dispute this fact.

By phrasing the scope of these two statutes as they did, there can be no doubt that California's Legislature both established and intended the CCRAA and the ICRAA to operate as separate and distinct statutes. Indeed, while the CCRAA and the ICRAA both touched on the same general class of background reports, they did not overlap because each statute expressly excluded reports governed by the other. Compare Cal. Civ. Code § 1785.3(c) with Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1. Therefore, unlike the FCRA, which applies to both "investigative consumer reports" and "consumer credit reports," California's Legislature clearly intended that the ICRAA and the CCRAA each exclusively apply to consumer reports containing different and distinct types of information. *Id.*; see also *Ortiz*, 157 Cal.App.4th at 613-615.

Accordingly, while both statutes touched on the same subject, the preparation and procurement of consumer reports, prior to 1998, they did not

apply to the same types of reports. Compare Cal. Civ. Code § 1785.3(c) with Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1. Moreover, prior to 1998, a party requesting a report could easily determine which statute applied by simply looking at the manner by which the information in the report was obtained. Compare Cal. Civ. Code § 1785.3(c) with Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1; *Ortiz*, 157 Cal.App.4th at 614.

C. California's Legislature's 1998 Amendment To The ICRAA Caused The ICRAA To Unconstitutionally Overlap With The CCRAA.

In 1998, California's Legislature amended the ICRAA in a manner that obliterated the distinction between consumer reports subject to the CCRAA and those subject to the ICRAA. Cal. Civ. Code §§ 1786.2(c), (f), Stats 1998, c. 988, § 1. By doing so, it rendered the ICRAA unconstitutionally vague, at least as to reports that were simultaneously subject to both statutes. *Ortiz*, 157 Cal.App.4th at 617, 619.

Specifically, the 1998 Amendment significantly broadened the ICRAA's definition of "investigative consumer reports" from being limited only to those reports containing information on an individual's character obtained only through "personal interviews," to include all reports containing such character information "obtained through any means." Cal. Civ. Code § 1786.2(c); Cal. Civ. Code §§ 1786.2(c), (f), Stats 1998, c. 988, § 1. As the *Ortiz* court found, whether the ICRAA or CCRAA applies now depends on the type of information contained in a background report, not on the method by which the information was collected. As the *Ortiz* court also found, this is a false distinction.

Because the same information, or types of information, can fit equally well within the rubric of information bearing on an individual's character as well as their credit worthiness, and because the post amendment ICRAA and the CCRAA simultaneously apply to consumer reports containing such information obtained through any means other than through personal interviews,

there is no longer any functional distinction between reports subject to one statute versus the other. *Ortiz*, 157 Cal.App.4th at 617, 619. Indeed, unless a consumer report is specifically excluded by the CCRAA or the ICRAA, and therefore necessarily falls under the coverage of the other, it is now impossible for persons of ordinary intelligence to determine whether the CCRAA or the ICRAA apply to consumer reports containing information bearing on their character. *Ortiz*, 157 Cal.App.4th at 619. Thus, an individual or entity may properly request a consumer report containing character information in accordance with the CCRAA, but nevertheless potentially be held to violate the ICRAA. Indeed, Ms. Connor attempts to do just that in this case.

D. With The Exception Of The Second Appellate District In This Case, California Courts Have Unanimously Found The ICRAA Unconstitutionally Vague "As Applied" To Reports Containing Information That Can Be Classified Both As "Character" And "Creditworthiness" Information.

With the exception of this action, courts considering the overlap between the CCRAA and the ICRAA, as a result of the 1998 amendment, have concluded that, whether the ICRAA or CCRAA applies to a consumer report, now depends on the type of information contained in a report, not on the method for collecting information. Starting with *Ortiz,* 157 Cal.App.4th at 604, courts have unanimously rejected the character-creditworthiness distinction as sufficient to differentiate the two statutes "as applied" to background reports, as here, containing information that can be classified both as character and creditworthiness information (*e.g.*, criminal records).

In *Ortiz*, the plaintiff tenant sued the defendant property manager for failing to comply with certain technical requirements set out in the ICRAA. In affirming judgment for the defendant as a matter of law, the court held that the ICRAA was unconstitutionally vague and unenforceable "as applied" to tenant screening reports containing unlawful detainer records.

The court observed that, although a statute must be upheld if it is amenable to "any reasonable and practical construction," the ICRAA, as amended in 1998, failed even under this highly deferential standard. The court first explained that the line between creditworthiness and character information is not "readily apparent," reasoning:

> While the statutes require a distinction between creditworthiness and character information, the line between the two is not readily apparent. On the one hand, a consumer's creditworthiness *itself* pertains to the consumer's character or personal characteristics. Creditworthiness is a personal attribute, the quality of being "financially sound enough that a lender will extend credit in the belief that the chances of default are slight; fiscally healthy." Creditworthiness information is a *type* of character information. On the other hand, certain types of character information may also constitute creditworthiness information. Information that a consumer has the character traits or personal characteristics of (or a general reputation for) dishonesty, profligacy, carelessness, or absentmindedness would reasonably relate to the consumer's financial soundness, likelihood of default, or fiscal health. At least these types of character information pertain to the consumer's creditworthiness.

Id. at 614-615, 619 (emphasis in original) (citations omitted). The court then held that the ICRAA, as amended in 1998, is unconstitutionally vague. Summarizing, the court declared:

> We are left with no rational basis to determine whether unlawful detainer information constitutes creditworthiness information subject to the CCRAA or character information subject to the ICRAA. We doubt any "person of ordinary intelligence" can do so either. Rather, credit reporting agencies and landlords "must necessarily guess at [the ICRAA's] meaning and differ as to its application."

Id. at 619. The court emphasized important differences between the ICRAA and CCRAA, and noted that the ICRAA imposes stricter duties and much more severe penalties than does the CCRAA. *Id.* at 614 and fns. 6 and 8.

The court of appeal reinforced the vagueness analysis in the companion case to *Ortiz*, *Trujillo,* 157 Cal.App.4th at 628. In *Trujillo*, the plaintiff tenants sued the defendant for, among other things, delivering tenant screening reports with incomplete unlawful detainer records to their prospective landlords. In affirming the dismissal of the ICRAA claims as a matter of law, the court reiterated:

> [T]he ICRAA is unconstitutionally vague because persons of reasonable intelligence cannot determine whether unlawful detainer information is character information subject to the ICRAA or creditworthiness information subject to the CCRAA. The Legislature intended to differentiate between character information and creditworthiness information, but ever since a 1998 ICRAA amendment, it is hopelessly uncertain on which side of the fence unlawful detainer information falls.

Id. at 640 (footnote and citations omitted).

This Court denied the plaintiffs' petition for review in *Ortiz* and *Trujillo* and denied the request to depublish the opinions. 2008 Cal. LEXIS 3069 (March 12, 2008) (*Ortiz*); 2008 Cal. LEXIS 2940 (March 12, 2008) (*Trujillo*).

Trial courts considering this issue have extended *Ortiz* to criminal record screening reports. In *Moran*, 2012 U.S. Dist. LEXIS at 158598, the plaintiff tenant sued the defendant for delivering an inaccurate screening report to his prospective landlord. The screening report disclosed information about the plaintiff's criminal past (*i.e.*, arrests and convictions). Relying on *Ortiz*, the Court ruled that the plaintiff's criminal records could be classified as either creditworthiness information (governed by the CCRAA) or character information (governed by the ICRAA), and therefore the ICRAA was unconstitutional and unenforceable "as applied" to the defendant's screening report concerning the plaintiff. Specifically:

> The reasoning in *Ortiz* applies with equal force to the present facts. As a preliminary matter, the parties agree that criminal information clearly pertains to a person's character and

> therefore subjects the Report to the ICRAA. Plaintiff disputes, however, that criminal information has any bearing on a consumer's creditworthiness. This argument is meritless. First, the text of the CCRAA implies that criminal information may be relevant to creditworthiness. Section 1785.13(a)(6) . . . prohibits credit reporting agencies from reporting "[r]ecords of arrest, indictment, information, misdemeanor complaint, or conviction of a crime that, from the date of disposition, release, or parole, antedate the report by more than seven years." This limitation implies that criminal information that occurs within seven years of the report may be included in a consumer credit report, revealing the lawmakers' contemplation that such information could be relevant to creditworthiness.
>
> Further, common sense dictates that a consumer's criminal record can provide insight into their creditworthiness and credit capacity. For example, . . . [r]ecords of stolen property crimes, such as the embezzlement conviction in this case, reasonably undermine a creditor or landlord's confidence that the consumer has a stable source of income, and that even if he did, he would be inclined to pay his debts or rent. Accordingly, the Court concludes that the criminal information in the instant Report clearly subjects it to the CCRAA as well as the ICRAA. As in Ortiz, the Court perceives no rational basis to decide that the Report should be governed by one statute versus the other. Thus, as applied here, the ICRAA is unconstitutionally vague because it failed to provide adequate notice to Defendant as to whether the statute covered its Report containing criminal information.

Id. at *20-22 (emphasis added). As in both *Ortiz* and *Trujillo*, the Court in *Moran* ruled for the defendant as a matter of law. See also *Olinick v. BMG Ent.* (2006) 138 Cal.App.4th 1286, 1301 (unpublished federal cases are citable as persuasive but not precedential authority).

The most recent case, *Roe*, 2013 U.S. Dist. LEXIS at 88936, extended the holding of *Ortiz* to employment background reports containing criminal records. In *Roe*, the plaintiff job applicant sued the defendant for

delivering an inaccurate background report to her prospective employer. The defendant moved for judgment on the pleadings. The plaintiff tried to distinguish Ortiz, but the Court rejected the arguments, reasoning:

> [T]he most fundamental flaw in [plaintiff's] argument is that it fails to recognize that criminal background information fits both into the category of character evidence under the ICRAA and in the category of creditworthiness under the CCRAA. Not only does the CCRAA imply as much, but "common sense dictates that [an applicant's] criminal record can provide insight into their creditworthiness and credit capacity." Thus, because criminal information bears both on character and on creditworthiness, the Court must address the issue at the center of this dispute: When one who compiles background checks is confronted with information that falls within both the ICRAA and the CCRAA, is there a rational basis to determine which statute governs the report? Like the courts before this action, the Court is compelled to answer that question in the negative. As the Trujillo court phrased it, "ever since a 1998 ICRAA amendment, it is hopelessly uncertain on which side of the fence [criminal history] information falls."
>
> The Court finds "that the criminal information in the instant Report clearly subjects it to the CCRAA as well as the ICRAA," and "the Court perceives no rational basis to decide that the Report should be governed by one statute versus the other." Accordingly, the ICRAA is unconstitutionally vague as applied because Defendant did not have sufficient notice that the statute covered the Report at issue.

Id. at *17-18 (citations omitted). The *Roe* court granted the defendant's motion and dismissed the plaintiff's ICRAA claims without leave to amend. Significantly, while the California Attorney General had notice of the defendant's constitutional challenge, it did not intervene in the action. (*Id.* at *2.)

E. The Post 1998 ICRAA Is Unconstitutionally Vague As Applied To The Background Reports At Issue In This Action.

As stated above, the *sine quo non* of an unconstitutionally vague statute is it "either forbids or requires the doing of an act in terms so vague that

[persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Roberts*, 468 U.S. At 629. As demonstrated below, the undisputed facts establish First complied with the CCRAA when it requested Ms. Connor's background reports. She admits this fact. Because neither the CCRAA nor the ICRAA, provide any notice that a party needs to comply with both, First was left to guess and speculate as to whether the ICRAA forbad its obtaining the reports in the manner it did or required First also comply with its terms. As a result, the ICRAA is unconstitutionally vague as applied as a matter of law.

1. First Complied With The CCRAA When Obtaining The Background Reports On Ms. Connor.

Ms. Connor does not contend First failed to comply with the CCRAA when it requested the subject background reports on her. She does not, because it is undisputed that First did.

The CCRAA applies to consumer reports obtained for an "employment purpose." Cal Civ. Code § 1785.3(f); (App. Brief, p. 6.) The term "employment purpose" under the CCRAA, like the ICRAA is defined as when a report is "used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee." Cal Civ. Code § 1785.3(f); Cal. Civ. Code. § 1786.2(f); see also Cal. Civ. Code § 1785.18(b) (stating consumer reports covered by the CCRAA include reports obtained for employment purposes), Cal. Civ. Code § 1875.20.5(a) (identifying the pre-request disclosure requirements an employer must comply with before requesting a consumer report covered by the CCRAA for employment purposes).

First requested and used the background reports on her to "in making decision about Plaintiff's employment," *i.e.* it used it for an employment purpose. (JA, p. 36:1-3.) Ms. Connor admits First requested the subject background reports for a purpose specifically authorized by the CCRAA. Cal Civ. Code § 1785.3(f).

She also admits that First complied with the CCRAA's requirements before requesting the subject background reports. At the time First requested Ms.

Connor's background reports, the CCRAA required an employer "provide [her] written notice" that:

1. Informed her "that a report will be used";
2. Stated "the source of the report"; and
3. "[C]ontain[ed] a box that [she] may check off to receive a copy of the [] report."

See Cal. Civ. Code § 1785.20.5(a), Historical and Statutory Notes, Stats.2011, c. 724. It is undisputed that First complied with these requirements.

First gave her the Notice. (JA, Vol. I, p. 166.) The Notice stated a "consumer report" may be prepared on her "[i]n connection with [her] employment or application for employment." (JA, Vol. I, pp. 213, 230.) The Notice identified the source(s) of the report, by identifying the sources of the information on which the report would be based and the name of the company preparing the report. (*Id.*) Finally, the Notice included a box she could check to request a copy of the report. (*Id.*)

First's compliance with the CCRAA is further established by Ms. Connor admission, and the Second Appellate District's conclusion, that none of the subject background reports contained information obtained by personal interviews – *i.e.* they contained no information excluded by the CCRAA. (JA, Vol. IV, p. 951-952; JA, Vol. X, p. 2298:14-18); Cal. Civ. Code § 1785.3(c); *Connor*, 239 Cal.App.4th at 535. Accordingly, it cannot be disputed that First requested the subject background reports in a manner specifically authorized by the CCRAA.

Significantly, there is nothing in the CCRAA to indicate that an employer requesting a consumer report pursuant to the CCRAA's provisions is also required to comply with the stricter requirements of the ICRAA.

The foregoing illustrates the fundamental problem in this action – that a party can comply with one statute while also seemingly be held to violate a separate and distinct statute covering the same subject. Stated another way,

following the ICRAA's 1998 amendment, a party requesting a background report can potentially be held liable for the ICRAA's ten thousand dollar ($10,000) penalty for engaging in completely legal conduct. Such a result is clearly unconstitutional. Ms. Connor however, improperly seeks to do just that.

F. Although First Complied With The CCRAA, The Second Appellate District Held The ICRAA Was Not Unconstitutionally Vague Because Compliance With The ICRAA Was Not "Positively Repugnant" To Compliance With The CCRAA.

In its decision, the Second Appellate District found the CCRAA and the ICRAA did not unconstitutionally overlap because the background reports First requested on Ms. Connor "also are governed by the ICRAA under its clear and unambiguous language" and First **could** comply with both. *Connor*, 239 Cal.App.4th at 538. The Court found there was "no 'positive repugnancy' between the CCRAA and the ICRAA" rendering the ICRAA unconstitutional. *Id.* The Court is simply mistaken in this regard.

Two statutes cannot be more in conflict, *i.e.* "positively repugnant" than this situation where First is facing massive potential liability for allegedly violating the ICRAA when it engaged in lawful conduct under the CCRAA. The CCRAA and the ICRAA are clearly in conflict with each other because the ICRAA purports to make unlawful conduct that is lawful under the CCRAA.

The *Connor* Court's citation to *Connecticut National Bank v. Germain* (1992) 503 U.S. 249 and *J.E.M. AG Supply, Inc. v. Pioneer Hi-Breed International, Inc.* (2001) 534 U.S. 124, which use the "positive repugnancy" term, are inapposite to this action. The Court in *Connecticut National Bank* held the two statutes at issue, two jurisdictional statutes - 28 U.S.C. §§ 1291 and 1292 and 28 U.S.C. § 158 - did not overlap because "each section confer[ed] jurisdiction over cases that the other section does not reach." *Connecticut National Bank*, 503 U.S. at 253. Unlike *Connecticut National Bank*, the *Connor* Court specifically found the subject background reports were simultaneously subject to the CCRAA and the ICRAA. *Connor*, 239 Cal.App.4th at 534.

Moreover, the *Connecticut National Bank* Court stated "[r]eduncies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, [] a court must give effect to both" to avoid "render[ing] one or the other wholly superfluous." *Connecticut National Bank*, 503 U.S. at 253. Finding the CCRAA and the ICRAA did not unconstitutionally overlap in this action would result in rendering the CCRAA improperly "superfluous." This is because the CCRAA allows a party to request a background report for employment purposes. Finding the CCRAA and the ICRAA did not unconstitutionally overlap would render this portion of the CCRAA – authorizing a party to obtain background reports for employment purposes that are not expressly excluded from its coverage and in compliance with its requirements – superfluous because the requesting party would nevertheless always be potentially held to violate the ICRAA. As discussed *infra* at Section V.H, a more reasonable interpretation of the CCRAA and the ICRAA that would not render either impermissibly superfluous would be to find they applied to different types of reports, as the Legislature clearly intended.

J.E.M. Ag Supply, Inc. is also inapposite to this case. The J.E.M Court considered the interrelationship between a utility patent issued under 35 U.S.C.S. §§ 101-103 and a plant variety protection certificate under 7 U.S.C.S. §§ 2402 ("PVP")/the Plant Variety Protection Act 7 U.S.C.S § 2321 *et seq.* ("PVPA"). The Court held there was no impermissible overlap between the utility patent statute and the PVP/PVPA because each statute addressed different subjects. Specifically, the Court stated:

> To be sure, there are differences in the requirements for, and covered or, utility patents and plant variety certificates issued pursuant to the PVPA. These differences, however, do not present irreconcilable conflicts because the requirements for obtaining a utility patent under § 101 are more stringent than those for obtaining a PVP certification, and the protections afforded by a utility patent are greater than those afforded by a PVP certificate. Thus, there is a parallel relationship

> between the obligations and the level of protection under each statute.

Id. at 142; see also *Id.* at 143-144 ("[f]or all of these reasons, it is clear that there is no 'positive repugnancy' between the issuance of utility patents for plants and PVP coverage for plants. . . . Here we can plainly regard each statute as effect because of its different requirements and protections").

In this action, the CCRAA and the ICRAA cover the exact same subject matter. Neither however, provides any notice that a party needs to comply with the ICRAA when requesting a background report as authorized by the CCRAA. Accordingly, as applied to consumer reports that are potentially within the ambit of both the CCRAA and the ICRAA, the post 1998 ICRAA violates the core tenant of due process. *Roberts*, 468 U.S. at 629.

G. The Arguments Presented Below Fail To Establish The Post 1998 ICRAA Was Not Unconstitutionally Vague As Applied To This Action.

The arguments Ms. Connor presented in the Court below do not establish the ICRAA is not unconstitutionally vague as applied to the background reports at issue in this action. They either miss the point or show the post-1998 ICRAA is in fact unconstitutionally vague as applied in this case.

1. Ms. Connor's Argument The ICRAA Is Not Unconstitutionally Vague Following The ICRAA's 1998 Amendment Is Without Merit.

Ms. Connor argued below that the Legislature intended the CCRAA and the ICRAA to "overlap" when it amended the ICRAA in 1998 by making them both apply to the exact same reports at the same time. This argument is without merit.

As an initial matter, even if this argument is true, it does not render the ICRAA any less unconstitutionally vague as applied to this action. Ms. Connor cited no authority establishing the Legislature's alleged intent to cause a statute to unconstitutionally overlap with another makes its doing so permissible.

Her argument also ignores the CCRAA's pre 2011 language stating it applies to all consumer reports used for "employment purposes" so long as they do not "contain[] information solely on a consumer's character, general reputation, personal characteristics, or mode of living which is obtained through personal interviews." Cal. Civ. Code § 1785.3(c). If the Legislature intended to cause the CCRAA and the ICRAA to overlap following the 1998 amendment, thereby effectively eliminating the CCRAA or eviscerating it to the point it only applied to consumer reports the ICRAA expressly excluded, it would have amended the CCRAA and removed this language from the statute.

At minimum, the Legislature would have replaced the CCRAA's limiting language, with language stating it only applied to reports that were expressly excluded from the ICRAA. The Legislature however, did not.

The fact the Legislature did not, shows it did not intend to reduce the CCRAA's scope when it amended the ICRAA in 1998. *Woosley*, (1992) 3 Cal.4th at 775-776. Moreover, the fact the Legislature has still not amended the CCRAA in this manner despite the extensive litigation involving the unconstitutional overlap between it and the ICRAA shows it intended the two statutes to have continuing separate spheres of application.

Furthermore, California's Legislature amended the CCRAA in 2011, in an apparent attempt to redraw the distinction between it and the ICRAA. See Cal. Civ. Code § 1785.20.5. At the time First requested the background report on Ms. Connor, the CCRAA stated, in pertinent part:

> Prior to requesting a consumer credit report for employment purposes, the user of the report shall provide written notice to the person involved. The notice shall inform the person that a report will be used, and the source of the report, and shall contain a box that the person may check off to receive a copy of the credit report.

Cal. Civ. Code § 1785.20.5(a), Historical and Statutory Notes, Stats. 2011, c. 724.

In 2011, the Legislature amended this section to now read:

> Prior to requesting a consumer credit report for employment purposes, the user of the report shall provide written notice to the person involved. The notice shall inform the person that a report will be used, and shall identify the specific basis under subdivision (a) of Section 1024.5 of the Labor Code for use of the report. The notice shall also inform the person of the source of the report, and shall contain a box that the person may check off to receive a copy of the credit report.

Cal. Civ. Code § 1785.20.5(a).

At the same time in 2011, the Legislature added Labor Code section 1024.5, which purports to limit the permissible purposes a consumer credit report for employment purposes can be requested under the CCRAA. Cal. Labor Code § 1024.5. Had the Legislature intended the CCRAA and the ICRAA to overlap by passing the 1998 amendments, it would not have amended Section 1785.20.5 as it did, or passed Labor Code section 1024.5. *Woosley*, 3 Cal.4th 775-776.

2. Ms. Connor's Contention The ICRAA Is Not Unconstitutionally Vague Because First Could Comply With The CCRAA And The ICRAA At The Same Time Is Irrelevant.

Ms. Connor's argument below that the ICRAA is not unconstitutionally vague because First could comply with it and the CCRAA at the same time, like her other arguments, is nothing more than a red herring she presents to distract this Court from the pertinent issues in this appeal. First has never claimed the ICRAA is unconstitutionally vague because "compliance with one statute makes it impossible to comply with the other" as Ms. Connor posited in her brief below. (App. Brief, p. 17.) First has not because the fact it could technically comply with both the CCRAA and the ICRAA at the same time does not make the ICRAA unconstitutionally vague. Rather, it is the fact that a defendant can potentially be held liable for violating the ICRAA, even though the alleged conduct is specifically authorized by the CCRAA, causes the ICRAA to be unconstitutionally vague as applied in this case.

Her contention the ICRAA's unconstitutionality could be avoided if First complied with both statutes before requesting a background report for employment purposes is also without merit. Indeed, this argument again highlights the constitutional problem the post 1998 ICRAA presents. Although the CCRAA and the ICRAA are in *pari materia*, they are separate and distinct statutes. Neither statute contains any language indicating a party requesting a background report as authorized by the CCRAA also needs to comply with ICRAA before doing so. Ms. Connor has not identified any provision in either statute indicating otherwise. In addition, she has presented no legal authority supporting her contention that First had to comply with the ICRAA when its conduct was specifically authorized by the CCRAA. She has not because there is no legal requirement First do so.

3. Ms. Connor's Argument That The CCRAA Does Not State It Contains Exclusive Authorization For Conducting Employment-Related Background Checks Is Irrelevant In This Action.

Ms. Connor also argued below that, because the CCRAA does not "state that it contains the sole and exclusive requirements for running employment-related background checks," it did not "expressly authorize" First to obtain the subject background reports on her. (App. Brief, p. 17.) This argument is also without merit.

As an initial matter, the CCRAA's plain language authorized First to obtain the subject background checks. During the relevant time period, the CCRAA authorized an employer to obtain a background report so long as the report did not contain information obtained through personal interviews. Cal. Civ. Code §§ 1785.3(c), (f).

That the ICRAA also applied to employment related background reports is the crux of the issue in this action. It is the ICRAA's overlap with the CCRAA that causes it to be unconstitutionally vague as applied to this action. That First could have complied with the ICRAA is irrelevant. Indeed, Ms. Connor

cited no authority supporting her apparent argument that an employer needs to comply with the ICRAA's more stringent requirements when requesting a background report notwithstanding the fact the CCRAA specifically permits it to obtain the report.

4. Ms. Connor Cited No Authority Supporting Her Argument That The ICRAA Is Not Unconstitutionally Vague And Unenforceable As Applied To This Action.

Ms. Connor's failure to cite even one case holding a defendant can be held liable for violating one statute while complying with another that is in *pari materia* with the first, shows her contention the ICRAA is not unconstitutionally vague as applied in this action is without merit. Indeed, all of the authority she relied on is clearly distinguishable and inapposite to this action.

For example, Ms. Connor's citation to several cases for the proposition that "[i]t is not unusual for more than one statute to apply to a single event or issue" does not support her claim the CCRAA and ICRAA do not unconstitutionally conflict in this case. (App. Brief, pp. 24-25.) First has never contended it is unconstitutional for more than one statute to apply to a single issue or event. First has not, because it is not the fact that the CCRAA and the ICRAA both regulate the preparation and procurement of background reports that raises the constitutional issue in this action. Rather, it is the fact the ICRAA purports to make illegal conduct the CCRAA expressly authorizes that causes the ICRAA to be unconstitutionally vague.

Her other argument that no constitutional issue is created where two statutes provide different penalties for conduct that violates both is also irrelevant because, as established above, First did not violate the CCRAA when it requested the background reports on her. Accordingly, it is not the fact that the ICRAA could potentially be applied in circumstances where the defendant violated both the CCRAA and the ICRAA at the same time that renders the ICRAA unconstitutional in this matter. Rather, it is the conflict created by Ms. Connor's

attempt to impose liability on First for allegedly violating the ICRAA when it engaged in conduct specifically permitted by the CCRAA.

For example, in *United States v. Batchelder* (1979) 442 U.S. 114, the issue before the Court was "whether a defendant convicted of the offense carrying the greater punishment may be sentenced only under the more lenient provision when his conduct violates both statutes." *Id.* at 116 (emphasis added). The defendant in *Batchelder* was convicted of violating 18 U.S.C. § 922(h) and sentenced to five years imprisonment, the maximum term available. *Id.* at 114. The defendant appealed contending his sentence violated the due process clause because another federal statute, 18 U.S.C.App. § 1202(a) that prohibited the identical conduct, only provided a maximum sentence of two years. *Id.*

The Court rejected the defendant's due process challenge finding he engaged in conduct that was prohibited by both statutes. *Id.* at 114-115. The Court noted the only distinction between the two statutes was they provided different maximum penalties. *Id.* at 115-116. The fact they did, however, did not cause them to be unconstitutionally vague. *Id.* On this point the Court stated:

> That his particular conduct may violate both Titles does not detract from the notice afforded by each. Although the statutes create uncertainty as to which crime may be charged and therefore, what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.

Id. at 116; see also *State v. Kittrell* (N.J. 1996) 145 A.2d 209 (holding the defendant's conduct that violated two statutes providing for different penalties did not cause the statutes to be unconstitutionally vague); *Edwards v. Butler* (5th Cir. 1989) 882 F.2d 160 (same).

Ms. Connor's reliance on *Harris v. Mexican Specialty Foods, Inc.* (11th Cir. 2009) 564 F.3d 1301, is even more misplaced. The *Harris* court did not

address the vagueness problem presented by two conflicting statutes. *Id.* Rather, it considered whether the FCRA's provision of a range of damages for a proven violation violates a defendant's due process rights because it "deprives potential defendants of notice of the consequences of violating the FCRA." *Id.*

Relying on *Batchelder*, the *Harris* court rejected this constitutional challenge holding, "potential defendants have notice of the consequences of violating the FCRA because it clearly defines what conduct is prohibited and the potential range of fines that accompanies noncompliance." *Id.* at 1311-1312.

The critical distinction between *Batchelder*, *Kittrell*, *Edwards*, *Harris*, and the instant action is they each involved situations where the defendants violated "two overlapping statutes." That did not occur in this case. As established above, First did not violate the CCRAA when it requested the subject background reports. Ms. Connor has not established, or even argued otherwise. Her reliance on *Batchelder* and its progeny, as well as her other inapposite legal authorities is without merit.

H. A Reasonable Interpretation Of The Post 1998 ICRAA Shows First Did Not Violate The ICRAA When Requesting The Background Reports On Ms. Connor.

While the Second Appellate District and Ms. Connor correctly stated a court should attempt to construe the CCRAA and the ICRAA in a manner that would not render the ICRAA unconstitutionally vague, they failed to do so.

While the fact that First complied with the CCRAA is a sufficient reason to reverse the Second Appellate District, if this Court attempts to interpret the CCRAA and the ICRAA in a manner to avoid the unconstitutional overlap, the only reasonable interpretation again shows First did not violate the ICRAA when it procured the subject background reports.

Statutes "are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional." *Erlich v. Municipal Court* (1961) 55 Cal.2d 553, 558; Lockheed, 28 Cal.2d at 484.

In interpreting a statutory scheme, the statute's structure and purpose must be considered. "The meaning of a statute may not be determined from a single word or sentence. *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 659. Rather, "the words of a statute [must be construed] in context, . . . harmoniz[ing] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.

The statute's various components should be read together to achieve the Legislation's overriding purpose. *Elsner v. Uveges* (2004) 34 Cal.4th 915, 933. Effect should be given to the entire statute and in a manner that would not render any part of the statute meaningless or extraneous or suggest that the Legislature "engaged in an idle act." Cal. Code Civ. Proc. § 1858; *Woosley*, 3 Cal.4th at 775-776. Applying this standard to the ICRAA in this action establishes that it does not apply to the background reports that First obtained on Plaintiffs.

As the *Ortiz* court noted, it appears California's Legislature amended the ICRAA in 1998, in response to the *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548 decision. The defendant in *Cisneros*, U.D. Registry, was a tenant screening company that provided information to landlords on potential tenants. U.D. Registry obtained its information from public sources and by sending written questionnaires to the tenant's prior landlords. The *Cisneros* plaintiffs alleged the reports U.D. Registry prepared qualified as "investigative consumer reports" under the pre-1998 ICRAA because they claim the written questionnaires on which the reports were based qualified as "personal interviews" under the act.

The court disagreed holding the pre-1998 ICRAA's "personal interview" requirement required the interview be "in person." The Court reasoned that, because "[t]he landlords who submit the information do not obtain it through interviews but through [their] personal observation of the premises" and U.D. Registry obtained this information "by way of forms sent to the subscribers to UDR's service," not through in person interviews, the written questionnaires are

"not a 'personal interview'" as required by the ICRAA. Accordingly, the reports did not meet the pre-1998 ICRAA's definition of an "investigative consumer report."

California's Legislature amended the ICRAA in 1998, by replacing its "personal interview" limitation in its definition of an "investigative consumer report" with the "through any means" language. The timing of the Legislature's amendment leads to the conclusion it did in an effort to broaden the ICRAA's coverage for reports containing non-public information - i.e. personal information that could only be obtained from individuals who are acquainted with the subject of the report - so that it was not limited to situations where the interviews were conducted "in person."

The Legislature's intent to do so is also shown by the fact it did not amend the CCRAA at the same time or amend the CCRAA's limitation on reports subject to its provision – i.e. those where the report contains information obtained through "personal interviews." This shows the Legislature did not intend to eviscerate or otherwise limit the CCRAA's scope but intended only to expand the ICRAA's definition of the term "personal interviews." *Woosley*, 3 Cal.4th at 775-776.

Applying the above stated well settled rules of statutory construction, the most reasonable interpretation of the post 1998 ICRAA's definition of an "investigative consumer report" would be one where the report contains non-public information regarding an individual obtained from persons who are acquainted with the individual "by any means" rather than only through "personal interviews." This interpretation continues to give effect to the Legislature's intent to differentiate between consumer reports subject to the CCRAA and those subject to the ICRAA by differentiating the reports by the manner in which the information contained in them is collected. This interpretation also comports with the rule of statutory construction to avoid an interpretation that renders any language in either statute superfluous.

Applying this interpretation to this action establishes the subject background reports are not "investigative consumer reports" as a matter of law. It is undisputed that Ms. Connor's background reports only contained information taken from public records. (JA, Vol. IV, pp. 951-952.) They did not contain any private information not contained in publically available sources or any information obtained from personal interviews. (*Id.*) Indeed, the Second Appellate District held such. *Connor*, 239 Cal.App.4th at 535. Accordingly, First should not be found to have violated the ICRAA.

VI.

CONCLUSION

As shown above, First complied with the CCRAA when it requested the subject background reports on her. Ms. Connor's attempt to assign liability under the ICRAA to First's otherwise completely legal conduct shows the ICRAA is unconstitutionally vague as applied to this action. Given the conflict that existed between the CCRAA and the ICRAA at the time First requested the subject background reports, the ICRAA unconstitutionally overlaps with the CCRAA and cannot be enforced in this action as a matter of law. This Court should therefore reverse the decision of the Second District Court of Appeal.

Dated: January 15, 2016

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CERTIFICATE OF WORD COUNT

Pursuant to CRC 8.204(c) and 8.486(a)(6), the text of this Opening Brief, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and this certificate, consists of 13,490 words in 13-point Times New Roman type as counted by the word-processing program to generate the text.

Dated: January 15, 2016 LITTLER MENDELSON, PC

By: _____

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I am employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 50 W. San Fernando, 15th Floor, San Jose, California 95113.2303. On January 15, 2016, I caused to be personally served using County Legal and sent via overnight mail:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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