Case No.: S229428

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EILEEN CONNOR,

Plaintiff and Appellant,

v.

FIRST STUDENT, INC., et al.,

Defendants and Respondents

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

Appeal from the Superior Court of Los Angeles County
Case No. JCCP 4624
Honorable John S. Wiley

ANSWER BRIEF ON THE MERITS OF PLAINTIFF AND APPELLANT EILEEN CONNOR

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QUESTION PRESENTED

Is the Investigative Consumer Reporting Agencies Act (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 (Civ. Code, §1785.1 et seq.) cannot determine which statute applies?

INTRODUCTION AND STATEMENT OF THE CASE

Defendant and Respondent First Student, Inc. ("First") ran background checks on tens of thousands of employees without adhering to the clear disclosure and consent requirements of ICRAA.[1] ICRAA requires an employer to take two steps before it runs a background check on an employee. First, it must disclose, in a document consisting solely of that disclosure, that it will conduct a background check. § 1786.16(a)(2)(B).[2] Second, it must obtain the employee's written authorization. § 1786.16(a)(2)(C).

First failed to take these two, uncomplicated steps before having HireRight Solutions, Inc. ("HireRight") conduct intrusive background checks on Eileen Connor and the other approximately 1,100 plaintiffs in these coordinated cases.[3] Accordingly, First is liable for violating ICRAA. § 1786.50.

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[1] Defendants-Respondents First Student, Inc. and First Transit, Inc. are referred to collectively as "Respondents" or "First." The term "background check" is used synonymously with the terms "consumer report" in this brief.

[2] All citations to statutory sections are to the California Civil Code except where otherwise noted.

[3] Plaintiff-Appellant is referred to as Ms. Connor.

Despite Respondents' clearly unlawful conduct, the Los Angeles Superior Court reluctantly granted summary judgment in favor of First. Believing itself to be bound by *Ortiz v. Lyon Management Group, Inc.*, 157 Cal. App. 4th 604 (2007), the Superior Court held that ICRAA is unconstitutional, thereby wiping away the protections of the law.[4]

The Second District Court of Appeal reversed the summary judgment. The Court of Appeal correctly found that ICRAA governs the background checks at issue. It then held that the possible applicability of CCRAA to the checks did not render ICRAA unconstitutionally vague. This is because, while ICRAA and CCRAA overlap, they are far from "positively repugnant." They do not even conflict. Therefore, under well-settled rules of statutory construction, the Court was bound to give effect to both acts.

With respect to *Ortiz*, the Court of Appeal correctly held that there is no support in the language of the acts for the *Ortiz* court's conclusion that a background check cannot be subject to both ICRAA and CCRAA. Neither act precludes the application of both acts to the same background check. Nor does the fact that the acts are separate but overlap render them unconstitutional. "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between the two laws, . . . , a court must give effect to both." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) (quoting *Wood v. United States*, 16 Pet. 342, 363 (1842)); *see also Pacific Palisades Bowl Mobile Estates, LLC v.*

[4] In *Ortiz*, the Fourth District Court of Appeal held that ICRAA was void for vagueness as applied to unlawful detainer reports used for tenant screening. *Ortiz* reasoned that ICRAA was unconstitutionally vague merely because CCRAA could also apply to those same reports.

City of Los Angeles, 55 Cal. 4th 783, 805 (2012). Applying this well-settled principle, the vagueness issue raised by *Ortiz* vanishes.

This Court should affirm the Second District Court of Appeal. Statutes are not void for vagueness merely because they overlap. *See, e.g., United States v. Batchelder*, 442 U.S. 114, 122-25 (1979); *Walker v. Superior Court*, 47 Cal. 3d 112, 141-43 (1988). Rather, a statute satisfies the notice requirements of due process if it is reasonably clear as to the conduct it prohibits and the penalties it imposes. ICRAA easily fulfills this test. Accordingly, it must be upheld here.

Furthermore, where there are two overlapping statutes and "[t]here has been no presentation of instances . . . where compliance with one Act makes it impossible to comply with the other," then courts should "apply[ ] the higher requirement as satisfying both." *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519 (1950) (holding that the Fair Labor Standards Act and federal prevailing wage law are complementary laws that both apply to a single government contract).

Here, First Student concedes that it could have complied with both ICRAA and CCRAA. Therefore, there is no statutory conflict and no constitutional problem.

Accordingly, Ms. Connor respectfully requests that this Court affirm the order of the Court of Appeal reversing summary judgment and remand to the Superior Court for further proceedings.

STANDARDS OF REVIEW

"The interpretation of a statute and the determination of its constitutionality are questions of law." *People v. Health Labs. of North Am., Inc.*, 87 Cal. App. 4th 442, 445 (2001). This Court reviews questions

of law de novo. *American Nurses Ass'n v. Torlakson*, 57 Cal. 4th 570, 575 (2013).

The underlying Superior Court order granting summary judgment is also reviewed de novo. *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 860 (2001). Summary judgment is only appropriate when the "moving party is entitled to judgment as a matter of law." Cal. Code Civ. Proc. § 437c(c). "In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences, in the light most favorable to the opposing party." *Aguilar*, 25 Cal. 4th at 843 (internal citations and quotation marks omitted).

BACKGROUND

I. Relevant Factual Background

The facts of this case are largely undisputed. Ms. Connor's case arises out of mass background checks conducted on tens of thousands of employees following a merger between two large transportation companies. In 2007, FirstGroup PLC ("FirstGroup"), a multi-national school bus company, purchased Laidlaw International, Inc. ("Laidlaw"), the then leading provider of contract school bus services in the United States. As a result of the deal, First, a subsidiary of FirstGroup, became the largest student transportation company in North America. 1 JA 5, p. 103:17-22; 2 JA 12, pp. 346-48; 3 JA 14, pp. 636-49.[5]

[5] Citations to the Joint Appendix ("JA") are in the format # JA #, p.#. The first number refers to the volume of the JA, the second number to the tab within that volume, and the third number to the cited page of the JA, with line numbers where possible. "SSMF" refers to a party's separate statement of material fact. Citations are provided at the end of each paragraph for ease of reading.

Ms. Connor was working for First as a school bus driver's aide when the mass screenings occurred. Beginning in October 2007, First had HireRight Solutions, Inc. ("HireRight"), a nationwide investigative consumer reporting agency, prepare a series of comprehensive background checks on Ms. Connor and all other former Laidlaw school bus drivers and aides. These comprehensive checks included criminal background reports, address histories, DMV records, and Social Security verifications. 1 JA 5 p. 104:11-18; 4 JA 18, p. 934:15-17; 4 JA 19, p. 953 (SSMF ¶ 7); 6 JA 24, p. 1312:9-12; 6 JA 25, pp. 1338-39 (SSMF ¶¶ 11, 14).

Prior to ordering these checks, First sent a multi-page "Safety Pack" to the school bus drivers and aides who had worked for Laidlaw. The Safety Pack was in the form of a booklet, which included an authorization form seeking permission to run the background checks.

The authorization form that First sent to Ms. Connor regarding her background check was called "Investigative Consumer Report Disclosure and Release." 5 JA 21 pp.1041. That form explicitly referred to ICRAA. *Id.* It did not refer to CCRAA.

The authorization form also sought a release of liability for First, HireRight, and any other person or entity providing information for the background checks. Further, it sought authorization for HireRight to supply information obtained in the background checks to "other companies that subscribe to" HireRight. 4 JA 19, pp. 953-54 (SSMF ¶ 8); 5 JA 21, p. 1041; 6 JA 25, pp. 1339-42 (SSMF ¶¶ 16-18). Thus, First's form violated ICRAA's requirement that the disclosures be made "in a document that consists solely of the disclosure." § 1786.16(a)(2)(B).

Like the other plaintiffs in this case, Ms. Connor did not sign or return the authorization form in the Safety Pack. That is, she did not consent to a background check. 4 JA 18, p. 934:18-19; 4 JA 19, p. 954

(SSMF ¶ 9); 6 JA 24, p. 1314:6-7; 6 JA 25, p. 1358 (SSMF ¶ 81). Nevertheless, First had HireRight prepare comprehensive background checks on all drivers and aides, including Ms. Connor. Those background checks violated ICRAA's requirement that an employee "authorize in writing the procurement of the report." § 1786.16(c).

First has since engaged HireRight to run periodic comprehensive background checks on its driver and aide employees. 6 JA 24, p. 1312; 6 JA 25, p. 1350 (SSMF ¶ 51).

II. Statutory Background: ICRAA and CCRAA

A. The Scope of ICRAA and CCRAA.

This suit arises under ICRAA, which is one of two significant statutes governing background checks performed for employment purposes in California. The Legislature designed ICRAA and its companion statute, CCRAA, to serve complementary, but not identical, goals. Enacted in 1975, the statutes are modeled after the federal Fair Credit Reporting Act ("FCRA"). *See* 15 U.S.C. § 1681 et seq. Together, ICRAA and CCRAA were designed to ensure that consumer reporting agencies "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." §§ 1785.1(c); 1786(b).

As relevant here, both ICRAA and CCRAA cover reports that are obtained for "employment purposes." §§ 1785.3(e); 1786.2(f). The statutes define a report used for employment purposes in identical terms, as "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee." §§ 1785.3(e); 1786.2(f).

ICRAA covers "investigative consumer reports," defined, in relevant part, as "a consumer report in which information on a consumer's character,

general reputation, personal characteristics, or mode of living is obtained through any means." § 1786.2(c). Simply put, ICRAA governs employee background reports which bear upon character. § 1786.2(c). ICRAA explicitly provides that it applies to the reporting of criminal records, civil judgments, and the like. § 1786.18.[6]

CCRAA covers "consumer credit reports." These are defined, in relevant part, to mean "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity." § 1785.3(c). CCRAA therefore governs employee background reports which bear upon credit. Like ICRAA, CCRAA explicitly applies to reports containing criminal records, civil judgments, and the like. § 1785.13.

Prior to 1998, consumer reports could be classified under CCRAA or ICRAA depending on the means used to collect the information in those reports. ICRAA was limited to reports based on information "obtained," at least in part, "through personal interviews." RJN Exh. B (§ 1786.2(c) (1975)).[7] CCRAA excluded reports that were based on information obtained solely through personal interviews. RJN Exh. A (§ 1785.3(c) (1975)). Thus, reports obtained solely through personal interviews were subject only to ICRAA.

However, ICRAA and CCRAA have overlapped in their coverage since their enactment in 1975. Neither statute has ever provided that it does not cover reports that are covered by the other. Furthermore, under the language of ICRAA and CCRAA as enacted, reports were covered by both

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[6] ICRAA excludes traditional credit reports limited to credit history. § 1786.2(c).

[7] RJN refers to Plaintiff-Appellant's Request for Judicial Notice, filed concurrently with this brief.

ICRAA and CCRAA if the reports contained information that (1) related to character *and* creditworthiness, (2) was gathered from public records *and* personal interviews, and (3) was used for employment purposes.[8] *See* RJN Exh. A (§1785.3(1975)); RJN Exh. B (§ 1786.18 (1975)); *see also* RJN Exh. H (explaining coverage of 1975 version of ICRAA). The overlap was deliberate, as is evident in the statutes' text.[9]

B. ICRAA's Expansion Under the 1998 Amendments.

In 1998, the Legislature expanded ICRAA to cover a broader range of reports and to impose higher penalties for violations. The Legislature wanted to conform ICRAA to certain 1997 FCRA amendments, which

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[8] A report that met these criteria would have met the requirements of CCRAA, as enacted, because it contains information bearing on a consumer's credit. It would not have been excluded from CCRAA because it did not contain information that is solely on a consumer's character. *See* RJN Exh. A (§ 1785.3(c) (1975)). Such a report would also have met the requirements of ICRAA, as enacted, because it contained information on a consumer's character obtained through personal interviews. It would not have been excluded from ICRAA because it is not limited to specific factual information related to a consumer's credit record. *See* RJN Exh. B (§ 1786.2(c) (1975)).

[9] Both *Ortiz* and the Court of Appeal below concluded incorrectly that the two statutes were mutually exclusive as enacted in 1975. 157 Cal. App. 4th at 616-17; Slip Op. at 12. The courts assumed that reports based on personal interviews fell under ICRAA, while reports based on public records fell under CCRAA. *Id.* Both courts failed to recognize that ICRAA from its inception covered reports that included both personal interviews and public information. *See* RJN Exh. H, at p. 2 (observing that ICRAA sections 1786.18, 1786.28 and 1786.30 "expressly recognize" that investigative consumer reports under ICRAA as drafted in 1975 "can and do contain information that is a matter of public record"); s*ee also* RJN Exh. B at §§ 1786.18, 1786.28, 1786.30 (1975). However, as discussed below, Argument Section II.A-B, this difference in interpretation of the statutes as drafted in 1975 is not significant because it is undisputed that ICRAA and CCRAA overlap after the 1998 amendments.

provided for additional disclosures and certification requirements before a background check could be run. The Legislature also wanted to preserve California's already stricter requirements and higher penalties. RJN Exh. F. Additionally, the Legislature wanted to address the expanding use of database information gathered from the internet, "such as DMV records, civil judgments, bankruptcies, criminal records, etc.," which had transformed the background check industry in the twenty years since ICRAA was first passed. RJN Exh. F, p. 4.

Thus, among other changes, the 1998 amendments eliminated the "obtained through personal interviews" limitation in ICRAA and replaced it with "obtained through any means." § 1786.2(c). As a result, ICRAA was expanded so that it would apply broadly to more employee background checks, including those based only on publicly available information. § 1786.2(c).[10] The 1998 amendments passed both the Senate and the Assembly unanimously, and Governor Pete Wilson signed them into law. RJN Exh. E.

C. Post-1998 Overlapping Coverage of ICRAA and CCRAA.

The 1998 amendments expanded the category of reports subject to ICRAA, and thus also expanded the category of reports subject to both ICRAA and CCRAA. As discussed below in Argument Section II.B, the Legislature was aware that the acts already overlapped, and intended them to overlap further after the 1998 amendments. It specifically drafted the 1998 amendments to be "consist[e]nt with related state and federal

[10] ICRAA continues to exclude credit reports that are "limited to specific factual information relating to a consumer's credit record or manner of obtaining credit obtained directly from a creditor." § 1786.2(c).

consumer credit acts." RJN Exh. J, at p. 7 (Sen. Judiciary Committee, Committee Bill Analysis, SB 1454, May 5, 1998).

The statutes do not overlap completely, however. Each continues to have exclusive spheres of operation. CCRAA continues to exclude reports containing information bearing solely on character that is obtained through personal interviews. § 1785.3(c)(5). ICRAA, therefore, is the only statute that applies to reports containing such information. § 1786.2(c).

Similarly, ICRAA excludes reports that are used solely to evaluate a consumer's eligibility for credit, and reports that are limited to specific factual information obtained directly from creditors relating to a consumer's credit record. § 1786(c)(2). CCRAA is the only statute that applies to such reports. § 1785.3(c). CCRAA also has a comprehensive set of requirements applicable to credit checks not found in ICRAA.[11]

After the 1998 amendments, background checks that are subject to neither of these exclusions are subject to both ICRAA and CCRAA.

III. Los Angeles Superior Court Proceedings

Ms. Connor is among approximately 1,100 individual school bus drivers and aides who sued First for conducting unlawful and unauthorized background checks in violation of ICRAA.[12] The Los Angeles Superior

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[11] *See, e.g.*, § 1785.5 (assembly, evaluation, or dissemination of information on checking account experiences of financial institution customers); § 1785.11.1 (security alerts in credit reports); § 1785.11.8 (credit card solicitations); § 1785.15.1 (credit scores), etc.

[12] First Transit, Inc., HireRight Solutions, Inc. and HireRight, Inc are also Defendants in the coordinated cases, in addition to First Student, Inc. Ms. Connor was not employed by First Transit, Inc., which is an affiliate of First Student and provides contract transportation services to public and private entities. *See* 1 JA 5, p. 107:11 (describing Ms. Connor's employment with First Student). HireRight, Inc. is the parent of HireRight Solutions, Inc. and, plaintiffs have alleged that both companies were

Court coordinated the drivers' and aides' individual complaints, pursuant to Rule of Court 3.550.[13]

The Fourth Amended Complaint, filed April 23, 2013, is the operative pleading. As relevant here, it describes how First failed to take the two straightforward steps that ICRAA requires of an employer before running background checks on all plaintiffs in the coordinated cases, as follows:

1. First had HireRight run investigative consumer reports without making the disclosures that ICRAA requires in a document consisting solely of those disclosures, in violation of section 1786.16(a)(2)(B);[14] and
2. First had HireRight run investigative consumer reports even though the drivers and aides had not "authorized in writing the procurement of the report[s]," in violation of section 1786.16(a)(2)(C).[15]

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involved in performing the background checks. *See* 1 JA 3. The case was stayed as to the HireRight entities while on appeal due to bankruptcy. *See* Slip Op. at 4-5, n.4.

[13] See 1 JA 3 (Fourth Amended Complaint); 10 JA 54 (Dkt. Entries 11/10/10).

[14] Neither the Safety Pack nor First Student's subsequent requests for authorization contained the ICRAA-required disclosures in a document consisting solely of those disclosures. 4 JA 18, pp. 934:21-935:4.

[15] *See* 1 JA 3. The Fourth Amended Complaint also alleges a cause of action under the Unfair Business Competition Law, Business & Professions Code section 17200. That claim is brought on behalf of those plaintiffs in the coordinated cases who suffered lost wages and other economic damages as a result of the illegal background checks. Connor does not fall into that category.

For purposes of summary judgment and trial, First chose Ms. Connor as one of several bellwether plaintiffs in the coordinated cases. First subsequently moved for summary judgment against Ms. Connor.[16]

In its summary judgment motion, First argued that ICRAA was unconstitutionally void for vagueness as applied to this case under *Ortiz*, 157 Cal. App. 4th 604. *See* 1 JA 4; 2 JA 11.

For the sole reason that it considered itself bound by *Ortiz*, the Superior Court granted summary judgment for First. 10 JA 41-43. The Superior Court noted that *Ortiz* was "quite a surprising ruling." However, it found that Ms. Connor's arguments were "proper only in a higher court." 10 JA 41, p. 2293.[17]

IV. Appellate Court Proceedings

Unlike the Superior Court, the Second District Court of Appeal was not constrained by the erroneous ruling in *Ortiz*. It reversed summary judgment. Slip Op. at 16. The Court agreed with Ms. Connor that "*Ortiz* was wrongly decided because it failed to consider case law governing the interpretation of overlapping statutes." Slip Op. at 5.

The Court began by pointing out that the background checks at issue are clearly subject to ICRAA. That conclusion is indisputable and First Student does not contest it.

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[16] 1 JA 4; 2 JA 11. Appellants' counsel also selected bellwethers, including Lorraine Brewton and Rolando Perez. HireRight moved for summary judgment against Ms. Brewton and Mr. Perez, but they settled and dismissed their claims before summary judgment, and thus are not involved in this appeal. 10 JA 54, at Dkt. Entries 11/14/2013, 3/18/2014. HireRight moved against bellwether Jose Gonzalez, whose case is now stayed pending HireRight's bankruptcy. *See* Slip Op. at 4-5 n.4.

[17] The Reporter's Transcript ("RT") was filed in the Court of Appeal on July 9, 2014.

Relying on well-settled principles of statutory interpretation including those repeatedly set forth by this Court, the Second District then refuted the two arguments at the heart of First's contention that ICRAA is unconstitutionally vague. First, the Court rejected the notion that a consumer report cannot be subject to both ICRAA and CCRAA. To the contrary, the Court determined, no "language in either act . . . precludes the application of both to the same consumer report." Slip Op. at 10; *see also* Slip Op. at 3. Further, First's argument that a report cannot be subject to both acts "simply is not supported by the language of the acts as now amended." *Id.*

In reaching this conclusion, the Court drew on the familiar principles that a court must interpret the law as the Legislature intended, giving effect to a statute's plain meaning, and avoiding constitutional issues where possible. Slip Op. at 13.

The Court further observed that overlap between statutes is not unusual, and certainly "does not render the acts unconstitutionally vague to the extent of that overlap." Slip Op. at 13. To the contrary, "redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between the two laws, . . . , a court must give effect to both." *Connecticut Nat. Bank*, 503 U.S. at 253 (quoting *Wood*, 16 Pet. at 363).

The Court then found that there was no "positive repugnancy" between CCRAA and ICRAA because it was possible to "comply with each act without violating the other." Slip Op. at 14. Moreover, despite the overlap between the statutes, each continues to reach certain specific cases. "Therefore," the Court held, "we can—and must—give effect to both acts." Slip Op. at 15.

The Court then rejected First's second argument, correctly concluding that CCRAA "does not 'specifically authorize' anything." Slip Op. at 15. Rather, CCRAA imposes obligations on users of consumer reports that pertain to creditworthiness. It does not absolve such users from complying with ICRAA. Slip Op. at 15.

"In short," the Court concluded, "to the extent the background checks at issue included information related to employees' character, First was required to comply with the requirements set forth in the ICRAA, regardless [of] whether First complied with the CCRAA." Slip Op. at 15-16.

ARGUMENT

Three well-settled rules of statutory interpretation easily resolve the issues presented in this case.

First, the test for whether a statute is void for vagueness is whether it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford* , 408 U.S. 104, 108 (1972). "All presumptions and intendments favor the validity of a statute." *Lockheed Aircraft Corp. v. Superior Court of Los Angeles County*, 28 Cal. 2d 481, 484 (1946). Thus, a statute "cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." *Id.*

Second, "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between the two laws, . . . , a court must give effect to both." *Connecticut Nat. Bank*, 503 U.S. at 253 (quoting *Wood*, 16 Pet. at 363). Furthermore, where there are overlapping statutes and "[t]here has been no presentation of instances . . . where compliance with one Act makes it impossible to comply with the

other," then courts are to "apply[ ] the higher requirement as satisfying both." *Powell*, 339 U.S. at 519.

Third, "when two codes are to be construed, they must be regarded as blending into each other and forming a single statute. . . . Accordingly, they must be read together and so construed as to give effect, when possible, to all the provisions thereof." *Pacific Palisades Bowl*, 55 Cal. 4th at 805; *see also United States v. Borden*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.")

In this case, the background checks at issue are subject to ICRAA. The requirements of ICRAA are clear. These indisputable conclusions should put to rest any contention that ICRAA is void for vagueness.

Nevertheless, First argues that this Court should find ICRAA unconstitutional. First ignores the three principles set forth above. Instead, First argues that ICRAA is void because it overlaps with CCRAA.

There is no "void for overlap" rule. Such a rule, it if existed, would invalidate many statutes in various areas of law, thereby wreaking havoc on our legal system. Instead, when statutes overlap, courts must determine whether it is possible to comply with both. If so, then courts must uphold both statutes. If one statute has higher standards than the other, then courts must apply the higher standard. *See Powell*, 339 U.S. at 519.

Here, First concedes that ICRAA and CCRAA have overlapped since at least 1998. First also concedes that it could have complied with both ICRAA and CCRAA when it ran the background checks. Under these facts, and the well-settled principles of statutory construction that apply to them, the Court should reject First's argument and affirm the Court of Appeal.

I. The Background Checks Are Subject to ICRAA Under Its Unambiguous Language

First argues that ICRAA is void for vagueness under the due process clause. The standard for defeating a void for vagueness challenge is not demanding. Rather, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford* , 408 U.S. 104, 108 (1972). As always, "[a]ll presumptions and intendments favor the validity of a statute." *Lockheed Aircraft Corp.*, 28 Cal. 2d at 484. Thus, a statute "cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." *Id.*

Furthermore, the analysis of whether a statute is void for vagueness must be conducted "in a specific *context*." *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1116 (1997) (emphasis in original). The question is not whether the statute "is vague in the abstract, but rather, whether it is vague as applied . . . in light of the specific facts of this particular case." *Cranston v. City of Richmond*, 40 Cal. 3d 755, 765 (1985).

In this case, it is indisputable that ICRAA applied to the background checks at issue. ICRAA's requirements are also simple and straightforward. First does not contend otherwise. This Court need go no further to reject the argument that ICRAA is void for vagueness.

A. ICRAA Applies to the Background Checks at Issue.

The Court of Appeal began its analysis by observing that First and HireRight were subject to ICRAA under its "plain statutory language." Slip Op. at 8. The Court of Appeal was correct to begin by focusing on ICRAA, because that is the statute under which Ms. Connor has brought her claim. A fundamental rule of statutory construction is that "the court should ascertain the intent of the Legislature so as to effectuate the purpose of the

law." *Walker*, 47 Cal. 3d at 121. "In determining such intent, the court turns first to the words of the statute." *Id.* Legislative history may also be relevant, although "[w]here the language is clear, there can be no room for interpretation." *Id.* (citations, alterations in quotations omitted).

Here, ICRAA states that it applies to character-related background checks performed for employment purposes. §§ 1786.2(c), (f); 1786.12. It defines an "investigative consumer report" as a "consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means." § 1786.2(c).

The report run on Ms. Connor included DMV records, criminal records, addresses, aliases, joint credit applicants, Social Security verifications, and similar information. *See* Section I, *supra*. These reports indisputably contain information relating to her "character, general reputation, personal characteristics, and modes of living" within the meaning of ICRAA. *See, e.g., TransUnion Corp. v. FTC*, 245 F.3d 809, 813 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 915 (2002) (noting broad scope of information that bears on "personal characteristics or mode of living" under FCRA's similar definition of a consumer report); *St. Clair v. Capital One Bank (USA), N.A.*, CIV. 12-1572 MJD/AJB, 2013 WL 1110803 (D. Minn. Mar. 18, 2013) (holding that motor vehicle records bear on "character, general reputation, and mode of living"). Indeed, criminal records are explicitly regulated by ICRAA. § 1786.18(a)(7). There is thus no doubt that ICRAA applies to the reports at issue.

Likewise, it is undisputed that HireRight furnished the reports for employment purposes, *i.e.*, so that First could determine whether to employ Ms. Connor and other school bus drivers and aides. *See* § 1786.2(f).

Indeed, the form that First sent to Ms. Connor regarding her background check was called "Investigative Consumer Report Disclosure and Release." 5 JA 1041. That form explicitly referred to ICRAA. *Id.* It is therefore clear that First knew that ICRAA applied to Ms. Connor's background check before it ordered that check.

The Court of Appeal therefore correctly found that there is no dispute that ICRAA applied to the background checks at issue:

> There is no question that the background checks included information on the employees' (or prospective employees') "character, general reputation, personal characteristics, or mode of living," and thus were investigative consumer reports under section 1786.2, subdivision (c). Nor is there any question that the investigative consumer reports were used for employment purposes, as defined in section 1786.2, subdivision (f). Therefore, under the plain statutory language, HireRight, as an investigative consumer reporting agency, and First, as a person who procured or caused the investigative consumer reports to be made, were required to comply with the applicable provisions of the ICRAA.

Slip Op. at 8.

B. ICRAA's Requirements Are Simple and Straightforward.

ICRAA's requirements for what employers must do before obtaining background reports regarding employees are easy to understand and follow. Under ICRAA, an employer must:

(1) Notify the employee of the permissible reason a report is being requested (e.g., for employment purposes);

(2) Notify the employee that the report may include information on the employee's "character, general reputation, personal characteristics, and mode of living";

(3) Notify the employee of the nature and scope of the investigation requested, including providing a summary of the

provisions of section 1786.22, as to how the employee can inspect the background check report and have it explained;

(4) Notify the employee of the website address of the investigative consumer reporting agency (if any, or its telephone number), and inform the employee if information will be sent outside of the United States[18];

(5) Provide all applicable disclosures in a document consisting solely of those disclosures; and

(6) Not perform the check unless the employee authorizes the report in writing.

§ 1786.16(a)(1)-(2).

The penalties available under ICRAA are also straightforward. Since 2001, the penalty for violating ICRAA has been $10,000 or actual damages, whichever is greater.[19] RJN Exh. K.

Accordingly, "[t]he provisions in issue . . . unambiguously specify the activity proscribed and the penalties available upon conviction." *Batchelder*, 442 U.S. at 123. For these reasons, First has not met its burden of showing that ICRAA is unconstitutionally vague as applied here. *See*

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[18] This clause became operative on January 1, 2012. § 1786.16(a)(2)(vi).

[19] The fact that ICRAA provides different penalties than CCRAA "is no justification for taking liberties with unequivocal statutory language." *Batchelder*, 442 U.S. at 121-22. Furthermore, First's attempt to distinguish *Batchelder* fails. *Cf.* Op. Br. at 40-41. In *Batchelder*, the U.S. Supreme Court set forth the framework for evaluating overlapping statutes, including the void for vagueness and implied repeal doctrines. The Court then upheld statutes that actually conflicted, because one statute imposed a stricter penalty than the maximum sentence allowed by the other statute. The logic of *Batchelder* applies here even more strongly to uphold overlapping statutes where one simply has "different elements" governing the same conduct, and there is no actual conflict. *Batchelder*, 442 U.S. at 125.

Gallo, 14 Cal. 4th at 1117; *Cranston*, 40 Cal. 3d at 765; *Lockheed Aircraft Corp.*, 28 Cal. 2d at 484.

II. ICRAA's Overlap with CCRAA Does Not Render It Unconstitutional

First argues that ICRAA is unconstitutional because in some cases it overlaps with CCRAA and applies higher standards. It is true that both ICRAA and CCRAA apply to background checks that could be described as both "character" reports under ICRAA and "creditworthiness" reports under CCRAA. However, as the Court of Appeal correctly held, this overlap does not make the statutes void for vagueness.

As a background principle, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *Borden*, 308 U.S. at 198 (upholding concurrent application of Sherman Anti-Trust Act and Agricultural Act); *see also, e.g., Connecticut Nat. Bank* , 503 U.S. at 253-54 (upholding concurrent application of two jurisdictional statutes); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 986 (2010) (upholding concurrent application of two attorneys' fees statutes). Thus, where overlapping statutes are silent as to how they affect each other, they are presumed to operate in tandem.

Overlap between statutes is not unusual. *Connecticut Nat. Bank*, 503 U.S. at 253-54. In fact, employment law regularly provides for "parallel [ ] overlapping remedies." *Alexander v. Gardner-Denver*, 415 U.S. 36, 47 (1974). For example, this Court has recognized that "employment discrimination cases, by their very nature, involve several causes of action arising from the same set of facts." *Brown v. Superior Court*, 37 Cal. 3d 477, 486 (1984). *See also Sanchez v. Swissport*, 213 Cal. App. 4th 1331, 1338-39 (2013) (Pregnancy Disability Law and Fair Employment and Housing Act overlap); *Arias v. Superior Court*, 46 Cal. 4th 969 (2009)

(describing overlapping wage claims brought under Labor Code, PAGA, and UCL, and expressing no concern); *Powell*, *supra*, 339 U.S. at 519 (upholding dual application of FLSA and federal prevailing wage statute, and holding defendant to the "higher requirement" of each statute).

Here, ICRAA and CCRAA overlap and are not mutually exclusive. First could have complied with both statutes when it ran the background checks. Each act continues to reach certain specific situations. Therefore the constitutional problem raised by First does not exist.

A. ICRAA and CCRAA Overlap.

All parties to this case agree that ICRAA and CCRAA overlap, at least after the 1998 amendments to ICRAA.[20] Following those amendments, as shown above (Background Section II.C), a report that meets the following criteria is within the scope of both ICRAA and CCRAA, but not excluded from either statute:

- A report containing information that bears on a consumer's credit *and* on a consumer's character, provided that the information is not limited to factual information on a consumer's credit record. *Compare* § 1785.3(c) *with* § 1786.2(c).

Such a report is subject to CCRAA, but not excluded from that statute. It is also subject to, but not excluded from, ICRAA.

Moreover, nothing in either statute provides that it does not apply to reports that are covered by the other statute. The Legislature knows how to

[20] While not important here in light of ICRAA and CCRAA's clear overlap since the 1998 amendments, as set forth above in Background Section II.A, ICRAA and CCRAA have overlapped since enactment in 1975.

make reports fall under one statute or another when it intends to do so. For example, the Legislature has provided that the term "commercial credit reports" does not include reports that are subject to CCRAA or ICRAA:

> "Commercial credit report" means any report provided to a commercial enterprise for a legitimate business purpose, relating to the financial status or payment habits of a commercial enterprise which is the subject of the report. It does not include a report subject to Title 1.6 [CCRAA] (commencing with Section 1785.1), Title 1.6A [ICRAA] (commencing with Section 1786), or a report prepared for commercial insurance underwriting, claims, or auditing purposes.

§ 1785.42.

Section 1785.42 is a perfect example of the language that the Legislature uses to indicate that certain types of reports that are covered by one statute are not subject to other statutes that govern reports. If the Legislature had intended for the category of reports subject to ICRAA to exclude reports subject to CCRAA, or vice versa, it would have said so using language similar to the language in section 1785.42(a).

Here, neither ICRAA nor CCRAA has ever stated that a report must fall under either one statute or the other. Nor has either statute ever stated that a report that falls under one statute may not fall under the other. This lack of explicit exclusivity should end the matter.

There are no grounds for reading in a wholesale mutual exclusion where the Legislature did not write one. "When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag. Supply, Inc. v. Pioneer Hi Bred*, 534 U.S. 124, 143-44 (2001) (upholding application of three patent laws all applicable to plants, each with differing levels of protection for property rights). Here, ICRAA and

CCRAA are easily "capable of coexistence" and there is no clear expression to the contrary. *Id.* Thus, both statutes should be given effect.

B. The Legislative History Demonstrates Further the Intentional Overlap Between ICRAA and CCRAA.

While this Court need not go beyond the clear, plain text of the statutes, the legislative history also indicates that the Legislature intended ICRAA and CCRAA to overlap.

The author of the 1998 Amendments stated unambiguously that they were intended to bring employment-related background checks under ICRAA's higher employee protections.[21] "I strongly believe," Senator Timothy Leslie wrote, "and SB 1454's language reflects this belief—that it should not matter *from where* information on a person is obtained, but that if this information is contained on a background check of that person for the express purpose of obtaining employment . . . then it should be subject to greater disclosure and accountability standards." RJN Exh. H at p. 3. Moreover, he asserted, "I stated my position loudly and clearly throughout SB 1454's legislative process and obviously, my colleagues in the Legislature overwhelmingly agreed with me since the bill received nary a no vote, nor did it receive any opposition letters from any special interests." *Id.*

Senator Leslie described an "investigative consumer report" subject to ICRAA as "[s]imilar to a consumer credit report" subject to CCRAA, because both include a "compilation of information on an individual, often used by employers when screening new applicants." RJN Exh. G, p. 3. The

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[21] "Statements of authoring legislators that cast light on the history of the measure and the arguments before the Legislature when it considered the matter . . . are indicia of legislative intent." *Estate of Sanders*, 2 Cal. App. 4th 462, 474 (1992).

proposed amendments to ICRAA were necessary, Senator Leslie explained, "to reflect the current broad use of database information, such as DMV records, civil judgments, bankruptcies, criminal records, etc." *Id.* The overlap is apparent, because reports compiled from these public record sources—for example, bankruptcies and civil judgments—could obviously also "bear on creditworthiness" and thus be included in consumer credit reports under CCRAA.

Indeed, in a letter to Governor Wilson, Senator Leslie forcefully rejected an argument that the overlap between ICRAA and CCRAA was unintentional. He wrote that there was no "confusion on [his] part—or on the part of the Legislature, which overwhelmingly passed this measure." RJN Exh. H, at p. 15. To the contrary, Senator Leslie explained that the 1998 Amendments were "intended to strengthen disclosure requirements for investigative consumer reports similar to what already exists today for consumer credit reports." *Id.* He also pointed out that CCRAA and ICRAA already overlapped in their coverage even prior to the 1998 amendments, as reports under both statutes included reports based on the same public records. *Id.*

C. The Statutes Do Not Conflict and Must Both Be Given Effect.

"Redundancies 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." *Connecticut Nat. Bank*, 503 U.S. at 253 (quoting *Wood*, 16 Pet. at 363); *see also, e.g., Natural Res. Def. Council, Inc. v. Arcata Nat'l Corp.*, 59 Cal. App. 3d 959, 965 (1976) (finding that statutes "are not in conflict, but rather supplement each other"). Accordingly, where there are two overlapping statutes and "[t]here has been no presentation of instances . . . where compliance with one Act makes it impossible to

comply with the other," then the court is to "apply[ ] the higher requirement as satisfying both." *Powell*, 339 U.S. at 519 .

In this case, First has presented no instances where compliance with one statute would make it impossible to comply with the other. In fact, in this case, it would have been easy for First to comply with both acts at the same time. Accordingly, this Court can and should give effect to both statutes, and there is no constitutional problem.

Ignoring this well-settled, long-standing rule of statutory construction, First contends that ICRAA is unconstitutional because First faces liability under ICRAA for engaging in "lawful conduct under the CCRAA." *See* Op. Br. at 33. First cites no authority in support of this supposed rule of statutory construction. And, as the Court of Appeal pointed out, "CCRAA does not 'specifically authorize' anything." Slip Op. at 15. Rather, CCRAA imposes obligations on users of reports that bear on credit. It does not absolve employers who run background checks that bear on character from complying with ICRAA.

Contrary to First's contention, Courts have long held that where two statutes overlap, the higher standard applies unless the statutes are "positively repugnant." The rule is the same where the statutes are in *pari materia*. This Court should apply that rule here. As the Court of Appeal found, doing so eliminates the constitutional problem raised by First with a simple statutory analysis, because it would have been easy for First to comply with both ICRAA and CCRAA.

1. Where Two Statutes Overlap, the Higher Standard Applies Unless the Statutes Are "Positively Repugnant."

Numerous courts have held that where two statutes overlap, the higher standard applies unless the statutes are "positively repugnant." For

example, in *Powell*, the U.S. Supreme Court considered whether the overtime provisions of the federal prevailing wage law, the Walsh-Healey Act, excluded the applicability of the Fair Labor Standards Act (FLSA). The Court found that in "some, and probably most" instances, the prevailing wages under the Walsh-Healey Act were higher than the minimum wages prescribed by the FLSA. *Powell*, 339 U.S. at 519. In other words, wages that were legal under the FLSA were prohibited by the Walsh-Healey Act.

The Court held that despite this overlap, the employees could avail themselves of both acts:

> Despite evidence that the two statutes define overlapping areas, Respondents contend that they should be construed as being mutually exclusive. There has been no presentation of instances, however, where compliance with one Act makes it impossible to comply with the other. There has been no demonstration of the impossibility of determining, in each instance, the respective wage requirements under each Act and then applying the higher requirement as satisfying both.

Id.

Here, too, First has failed to show that it is impossible to comply with both statutes. Nor has First demonstrated that it is impossible to determine the requirements under each statute. Accordingly, the higher requirement of ICRAA should apply.

California law is in accord. In *Natural Resources Defense Council*, the plaintiffs sought a writ of mandate to compel the state forester to set aside certain timber harvesting plans that did not include environmental impact reports. *Natural Res. Def. Council*, 59 Cal. App. 3d at 965. The issue on appeal was whether timber operations conducted pursuant to the Forest Practice Act were also subject to the California Environmental Quality Act (CEQA). *Id.* at 963. CEQA requires environmental impact

reports. *Id.* at 965. The later enacted Forest Practice Act does not. *Id.* at 964.

In other words, conduct that is lawful under the Forest Practice Act is unlawful under the CEQA. Despite this overlap, the Court of Appeal held that the timber harvesting plans were subject to the more stringent requirements of CEQA. *Id.* at 970.

Numerous other cases reach similar results. *See, e.g., J.E.M. Ag. Supply*, 534 U.S. at 143-44 (multiple patent regimes given mutual effect); *Alexander v. Gardner-Denver*, 415 U.S. 36, 47 (1974) (multiple protective employment statutes upheld); *Sanchez v. Swissport*, 213 Cal. App. 4th 1331, 1338-39 (2013) (holding that remedies under the Pregnancy Disability Leave Law supplement remedies available under FEHA).

2. The Rule Is the Same Where Statutes Are in *Pari Materia.*

First seem to contend that the cases cited by Ms. Connor are distinguishable because they involve statutes that are not in *pari materia.*[22] This contention fails because many of the cases that Ms. Connor cites do involve statutes that are in *pari materia.*

"Statutes are considered to be in *pari materia* when they relate to the same person or thing, to the same class of person of things, or have the same purpose or object." *Walker*, 47 Cal. 3d at 124, n.4. This Court has recognized that where statutes are in *pari materia* they may have different requirements such that a violation of one is not a violation of the other:

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[22] *Cf.* Op. Br. at 39 ("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.").

> Even if statutes stand in pari materia, "each retains its independence and a violation of one is not necessarily a violation of the other." . . . Similarly, a defense to one is not necessarily a defense to the other.

Id. (quoting 2A Sutherland, Statutory Construction 468 (Sands, 4th ed. 1984)).

Moreover, in *Natural Resources Defense Council*, the First District Court of Appeal explicitly applied the *pari materia* doctrine to find that the Forest Practice Act and CEQA both applied to timber harvesting plans. 59 Cal. App. 3d 959. The court noted that "statutes which are *in pari materia* should be read together and harmonized if possible." *Id.* at 965. Moreover, "the two should be reconciled and construed so as to uphold both of them if it is reasonably possible to do so." *Id.*

Other cases that Ms. Connor has cited do not expressly discuss whether the statutes are in *pari materia*. However, in each of these cases the statutes relate to the same person or thing, or the same class of person or things. *See J.E.M. Ag. Supply*, 534 U.S. at 143-44 (multiple patent regimes); *Connecticut Nat. Bank*, 503 U.S. at 253 (dual jurisdictional provisions); *Pacific Palisades Bowl*, 55 Cal. 4th at 805 (multiple environmental statutes)). Each of those cases is applicable, because the statutes at issue fall within the definition of in *pari materia* set forth in *Walker*, above.

For example, in *Pacific Palisades Bowl*, 55 Cal. 4th at 805, this Court explained the general principle that, "[a] court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions."

Applying these principles, this Court found that Government Code section 66427.5 requires a particular hearing "*in addition* to the procedures

and hearings required by other state laws." 55 Cal.4th at 805. A contrary reading, this Court found, "not only fails to harmonize the [statutes] but, by overriding their provisions, also effects an implied partial repeal of them." *Id.* at 806. The Court explained that "only if no other construction were feasible" would it have adopted a reading making the statutes mutually exclusive and writing some of their provisions out of existence. *Id.*

Under this well-established authority governing the interpretation of statutes, this Court should reject First's contention that laws are unconstitutional when they treat the same subject matter and one sets forth higher standards than the other. Such a rule would invalidate many overlapping statutes in different legal sectors. It would also run counter to the cases set forth above.

3. First Could Have Complied with Both ICRAA and CCRAA.

There is no dispute that First could easily have complied with both ICRAA and CCRAA without violating either. To the contrary, First admits throughout its brief that it could have complied with both ICRAA and CCRAA in running the background checks at issue. Op. Br. at 37, 38.

Accordingly, in this case there are two overlapping statutes that are not positively repugnant. Therefore there is no constitutional problem and the higher standards of ICRAA apply.

D. First's Ability to Comply with Both ICRAA and CCRAA Is Directly Relevant to the Issue of "Repugnancy."

Contrary to First's contention, the fact that that First could have complied with both ICRAA and CCRAA is directly relevant to this appeal. *Cf.* Op. Br. at 37. That is because, as the U.S. Supreme Court has explained:

> [W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the

> contrary, to regard each as effective. . . . [T]his Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases.

J.E.M. Ag Supply, 534 U.S. at 143-44 (internal quotation marks omitted).

Here, ICRAA and CCRAA are capable of coexistence because it is possible to comply with both statutes. Furthermore, both ICRAA and CCRAA continue to reach some distinct cases after the 1998 amendments. As the Court of Appeal noted:

> [D]espite the overlap between the CCRAA and the ICRAA after the 1998 amendment, there remain certain consumer reports that are governed exclusively by the ICRAA (those with character information obtained from personal interviews) or by the CCRAA (those that include only specific credit information), because each act expressly excludes those specific reports governed by the other act. (See §§ 1785.3, subd. (c)(5)[;] 1786.2, subd. (c)....Therefore, we can—and must—give effect to both acts.

Slip Op. at 14-15.

Accordingly, this Court should not hesitate to give effect to both ICRAA and CCRAA.

III. This Court Should Affirm the Second District and Decline to Follow Ortiz

The decision of the Second District is well-reasoned and consistent with federal and state authority on the issue of how courts should handle statutes that overlap. Those authorities establish that when two statutes overlap, and each continues to reach some distinct situations, courts must give effect to both statutes unless there is positive repugnancy.

Ortiz, on the other hand, ignores those federal and state authorities. Moreover, *Ortiz*'s conclusion that a consumer report cannot be subject to both ICRAA and CCRAA is not supported by any language in those acts.

This Court should therefore affirm the decision of the Second District, and decline to follow *Ortiz*.[23]

A. This Court Should Affirm the Second District.

The analysis of the Court of Appeal is well-reasoned and consistent with federal and state authority on the issue of how courts should handle statutes that overlap. The Court properly began its analysis by pointing out that ICRAA clearly governs the background checks at issue.

The Court then addressed two arguments that are at the heart of First's contention that ICRAA is unconstitutionally vague. First, the Court rejected First's argument that a consumer report cannot be subject to both ICRAA and CCRAA. That argument "simply is not supported by the language of the acts as now amended." Slip Op. at 13.

Then, the Court found that there was no "positive repugnancy" between CCRAA and ICRAA because it was possible to "comply with each act without violating the other." Slip Op. at 14. And, despite the overlap between the statutes, each continued to reach certain specific cases. "Therefore," the court held, "we can—and must—give effect to both acts." Slip Op. at 15. By doing so, it explained, "the constitutional vagueness issue identified by *Ortiz* [citation], and relied upon by First, disappears." Slip Op. at 15.

Finally, the Court correctly concluded that CCRAA "does not 'specifically authorize' anything." Rather, it imposes obligations on users

[23] The Superior Court itself questioned *Ortiz*, describing the case as "quite a surprising ruling." RT, p. 7:12-13. The court compared *Ortiz* to the "hated" decision of *Lochner v. New York*, 198 U.S. 45 (1905). *Id.*, pp.8:13- 9:17. As Judge Wiley observed, *Lochner*'s doctrine of "substantive due process, mostly, with a couple of very notorious and controversial exceptions, went out the window" but seemingly "comes back" in *Ortiz*. RT p. 9:10-16.

of consumer reports that pertain to creditworthiness. It does not absolve such users from complying with ICRAA.

In its brief to this Court, First has not cited any new authorities that contradict the Court of Appeal's straightforward and well-supported analysis. Nor has First raised any new arguments that refute the Court of Appeal's opinion. This Court should therefore affirm the opinion of the Court of Appeals.

B. This Court Should Decline to Follow Ortiz.

Unlike the Second District, the *Ortiz* court did not address the well-established case law governing interpretation of overlapping statutes. The *Ortiz* court also did not consider the binding authorities which establish that mere overlap does not make a statute unconstitutionally vague.

The *Ortiz* court also failed to consider the extensive case law acknowledging that it is common for two statutes to overlap. It also failed to consider the rule that when two statutes are construed they "must be regarded as blending into each other and forming a single statute," so as "to give force and effect to all of their provisions." *Pacific Palisades Bowl*, 55 Cal. 4th at 805 (citations, internal quotation marks omitted).

At its core, *Ortiz* is based on the erroneous conclusion that even after the 1998 amendments the Legislature intended for consumer reports to fall under either ICRAA or CCRAA, but not both. *Ortiz* based this conclusion on two arguments. Neither is convincing.

First, *Ortiz* noted that ICRAA and CCRAA are "two separate statutes." 157 Cal. App. 4th at 614. But that fact does not resolve the issue of whether the Legislature intended those statutes to be mutually exclusive. As Ms. Connor has shown, separate statutes regulating the same conduct

are not uncommon, particularly in employment law. There is no rule that separate statutes are void merely because they overlap.

Second, *Ortiz* reasoned that "[n]othing in the statutes suggests any *one* item of information may constitute *both* creditworthiness and character information such that it alone subjects a tenant screening report to *both* statutes." 157 Cal. App. 4th at 615. As set forth above, that analysis is incorrect. To the contrary, ICRAA and CCRAA have always recognized that some items of information constitute both creditworthiness and character information.

For these reasons, the *Ortiz* court failed to consider the applicable federal and state authorities, and misconstrued the relevant statutes. This Court should decline to follow it.

C. *Ortiz*'s Progeny Are All Based upon *Ortiz*'s Erroneous Analysis and Conclusions.

The small handful of cases that follow *Ortiz* all adopt that case's flawed analysis and conclusion without further discussion. For example, *Trujillo v. First Am. Registry*, 157 Cal. App. 4th 628 (2007), is a companion case that was decided on the same day as *Ortiz*. The same Justice who wrote the *Ortiz* decision wrote *Trujillo*, with the same panel concurring. *Trujillo* adopted Ortiz's conclusion without further analysis. *Id.* at 640.

Moran v. The Screening Pros, 2012 U.S. Dist. LEXIS 158598 (C.D. Cal. Sept. 28, 2012), is a federal district court decision that is currently on appeal before the Ninth Circuit. In that case, the district court adopted and relied upon the reasoning of *Ortiz*. *Id.* at *17-22. *See* RJN, Exh. M. *Moran* had been stayed pending the outcome of this case. RJN, Exh. M.

Finally, *Roe v. LexisNexis Risk Solutions, Inc.*, 2013 U.S. Dist. LEXIS 88936 (C.D. Cal. Mar. 19, 2013), is another federal district court

decision that based its holding on *Ortiz*'s conclusion. *Id.* at *12-18. *Roe* settled prior to appellate review. *See* RJN, Exh. L.

Trujillo, *Moran* and *Roe* all rely upon the flawed analysis and conclusion of *Ortiz*. Accordingly, this Court should decline to follow them.

IV. First's Remaining Arguments Are Unavailing

First's remaining two arguments are similarly unavailing. The 2011 amendment of CCRAA is not relevant, and, at any rate supports upholding both ICRAA and CCRAA. Furthermore, the Court should reject First's effort to limit ICRAA post 1998 to reports containing only non-public information.

A. The 2011 Amendment to CCRAA Is Not Relevant Here.

The Legislature's amendment of CCRAA in 2011 and subsequent enactment of Labor Code section 1024.5 do not shed any light on whether it intended ICRAA and CCRAA to overlap either at the time of enactment or following the 1998 amendments. *Cf.* Op. Br. at 36-37; *see Apple Inc. v. Superior Court*, 56 Cal. 4th 128, 145-146 (2013) ("The declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law.") (internal citation, quotation marks omitted).

Rather, the 2011 amendment indicates only that CCRAA continued to govern certain specific instances after the 1998 amendments. As set forth above in Section II.C, that conclusion supports giving effect to both ICRAA and CCRAA.

Furthermore, in 2011 the Legislature acted to provide additional rights to consumers who are the subject of credit reports for employment purposes. That desire has no bearing on whether the Legislature intended ICRAA and CCRAA to overlap in 1975 or in 1998, although it does

indicate the Legislature's desire for a robust scheme to protect employees from intrusive background checks.

B. ICRAA Is Not Limited to Reports That Contain Non-Public Information.

There is no support for First's contention that post 1998 ICRAA is limited to background check reports that contain non-public information. *Cf.* Op. Br. at 41-44. First did not raise this argument in the Superior Court. Therefore it has been waived. 9 Witkin Cal. Proc. 5th (2008) Appeal, § 400, p. 458 (discussing rule that points not raised below are generally waived on appeal); *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1350 n.12 (2008) ("'A party is not permitted to change his position and adopt a new and different theory on appeal.'") (quoting *Ernst v. Searle*, 218 Cal. 233, 240-41 (1933)).

Moreover, nothing in the text or legislative history of ICRAA supports such an extreme limitation. To the contrary, the Legislature specifically intended to expand ICRAA in 1998 so as to encompass the broad scope of public records that were increasingly available from the internet. *See* RJN Exh. F at p. 4.

First has cited no case or other authority that limits ICRAA post 1998 to reports containing non-public information. This Court should therefore reject First's effort to read the Legislature's broadening of ICRAA in 1998 as indicative of an intent to severely limit that statute.

CONCLUSION

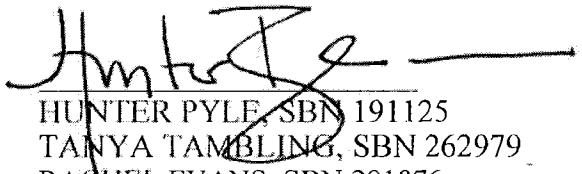
First has argued that ICRAA is void for vagueness because it overlaps with CCRAA. However, the fact that the Legislature was so concerned about employment background checks that it passed two laws governing them does not make ICRAA unconstitutional. This Court should reject such a radical expansion of the void for vagueness doctrine.

The outcome of this case will have significant ramifications that extend well beyond the parties to this litigation. Should the Court agree with First, it will not only defeat the claims of the plaintiffs in these coordinated cases. It will also effectively repeal the protections of both ICRAA and CCRAA for all California employees. The Court should avoid such a drastic result because a proper reading of ICRAA and CCRAA refutes First's unconstitutional vagueness argument. Furthermore, repealing ICRAA and CCRAA would be directly contrary to the fundamental principle that the Court should above all uphold the intent of the Legislature.

ICRAA is easily upheld here. It is crystal clear in its scope, application, and penalties. It is unremarkable that its protections overlap with the protections set forth in CCRAA. Accordingly, and for all the reasons discussed above, Ms. Connor respectfully requests that the Court affirm the ruling of the Second District Court of Appeal, and remand for further proceedings.

February 19, 2016

Respectfully submitted,

By: 

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CERTIFICATE OF WORD COUNT

I, Hunter Pyle, co-counsel for Plaintiff & Appellant Eileen Connor, certify pursuant to California Rule of Court 8.204(c) that the word count for this document is 11,013 words, excluding the tables, this certificate, and the Certificates of Interested Entities or Persons. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California, on February 19, 2016.

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PROOF OF SERVICE

SUPREME COURT OF CALIFORNIA

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Sundeen Salinas & Pyle, 428 13th Street, 8th Floor, Oakland, California 94612. On this day, I served the foregoing Document(s):

ANSWER BRIEF ON THE MERITS OF PLAINTIFF AND APPELLANT EILEEN CONNOR

☒ By Overnight Delivery to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

California Supreme Court
Office of the Clerk
350 McAllister Street
San Francisco, CA 94102-7000

☒ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Sundeen Salinas & Pyle, mail placed in that designated area is given the correct amount of postage and is either picked up or deposited that same day, in the ordinary course of business in a United States mailbox in the City of Oakland, California.

See attached service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, February 19, 2016.

Verenice Andrade

SERVICE LIST

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