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No. S229428

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
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Deputy

EILEEN CONNOR
*Plaintiff-Appellant,*
v.
FIRST STUDENT, INC., et al.,
*Defendants-Respondents*

Court of Appeal, Second Appellate District, Case No. B256075
Los Angeles County Superior Court, Case No. JCCP 4624
The Honorable John S. Wiley

# APPLICATION TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* A NEW WAY OF LIFE REENTRY PROJECT, BAY AREA LEGAL AID, BET TZEDEK LEGAL SERVICES, CENTER FOR EMPLOYMENT OPPORTUNITIES, COLLATERAL CONSEQUENCES RESOURCE CENTER, COMMUNITY SERVICE SOCIETY OF NEW YORK, DRUG POLICY ALLIANCE, EAST BAY COMMUNITY LAW CENTER, ELLA BAKER CENTER FOR HUMAN RIGHTS, EQUAL RIGHTS ADVOCATES, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, LEGAL ACTION CENTER, LEGAL AID FOUNDATION OF LOS ANGELES, LEGAL AID OF MARIN, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, LEGAL SERVICES OF NORTHERN CALIFORNIA, NATIONAL CONSUMER LAW CENTER, NEIGHBORHOOD LEGAL SERVICES OF LOS ANGELES COUNTY, NORTH CAROLINA JUSTICE CENTER, PUBLIC COUNSEL, PUBLIC INTEREST LAW PROJECT, PUBLIC LAW CENTER, ROOT & REBOUND, RUBICON PROGRAMS, WESTERN CENTER ON LAW AND POVERTY *IN SUPPORT OF PLAINTIFF-APPELLANT*

*Service on Attorney General required pursuant to California Rule of Court 8.29(c)*

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# APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF A NEW WAY OF LIFE REENTRY PROJECT, BAY AREA LEGAL AID, BET TZEDEK LEGAL SERVICES, CENTER FOR EMPLOYMENT OPPORTUNITIES, COLLATERAL CONSEQUENCES RESOURCE CENTER, COMMUNITY SERVICE SOCIETY OF NEW YORK, DRUG POLICY ALLIANCE, EAST BAY COMMUNITY LAW CENTER, ELLA BAKER CENTER FOR HUMAN RIGHTS, EQUAL RIGHTS ADVOCATES, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, LEGAL ACTION CENTER, LEGAL AID FOUNDATION OF LOS ANGELES, LEGAL AID OF MARIN, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, LEGAL SERVICES OF NORTHERN CALIFORNIA, NATIONAL CONSUMER LAW CENTER, NEIGHBORHOOD LEGAL SERVICES OF LOS ANGELES COUNTY, NORTH CAROLINA JUSTICE CENTER, PUBLIC COUNSEL, PUBLIC INTEREST LAW PROJECT, PUBLIC LAW CENTER, ROOT & REBOUND, RUBICON PROGRAMS, WESTERN CENTER ON LAW AND POVERTY *IN SUPPORT OF PLAINTIFF-APPELLANT*

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## APPLICATION TO FILE AMICUS BRIEF

Pursuant to the California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as *amici curiae* in support of Plaintiff-Appellants Eileen Connor and Jose Gonzalez.

This application is made pursuant to Rule 8.200(c) of the California Rules of Court and Section 12 of the Code of Civil Procedure. No party or counsel for any party in the pending appeal authored the proposed *amicus* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the *amicus curiae*, their members, or their counsel in the pending appeal.

### I. Background of *Amici Curiae*

**A New Way of Life Reentry Project (ANWOL)** is home to the largest reentry legal clinic in Southern California, filing over a thousand expungement petitions to help people overcome barriers to gainful employment imposed by old criminal records. ANWOL also carries out impact litigation work on behalf of the formerly-incarcerated or convicted people. Ever since the decision of the District Court in *Moran v. The Screening Pros* finding ICRAA unconstitutionally vague, however, ANWOL attorneys have lost an important tool in removing employment barriers for people determined to re-enter our community as productive members.

**Bay Area Legal Aid (BayLegal)** is the largest provider of free civil legal services to low-income residents of the San Francisco Bay Area. More than 60,000 low-income individuals annually benefit from our wraparound legal services in housing preservation, domestic violence and sexual assault prevention, economic security, consumer protection, and healthcare access. BayLegal's consumer protection unit protects vulnerable low-income individuals from unfair debt collection and credit reporting abuses, including errors on investigative reports. In our reentry practice, BayLegal focuses on the specific vulnerabilities of formerly incarcerated populations, including holistic legal representation related to obstacles securing work and housing based on incorrect reporting of criminal backgrounds. California's Investigative Consumer Reporting Agencies Act (ICRAA) is an effective and important tool employed across our practice areas to protect the rights of workers and tenants, help people obtain economic stability, and end the cycle of poverty. The District Court's ruling would negatively impact our mission to help secure a brighter future for low-income residents of the Bay Area.

For the past 40 years, **Bet Tzedek Legal Services** has provided free, comprehensive legal services for low-income individuals and families in Los Angeles, proving that access to justice makes a difference in people's lives. From humble beginnings as a small group of volunteer attorneys helping Holocaust survivors facing gentrification in the Fairfax District, Bet Tzedek has grown into a public interest law firm with a footprint across Los Angeles County and beyond, with practice area expertise in Elder/Caregiver Law, Consumer Rights,

Employment Rights, Guardianships, Human Trafficking, Health, Holocaust Reparations, Housing, Public Benefits and more. Our staff seeks innovative solutions to persistent poverty. Whether harnessing the power of technology to overcome barriers or mobilizing communities through collaborative partnerships, we seek to empower the more than 20,000 people we serve every year with the help of hundreds of pro bono attorneys and volunteers. Bet Tzekek's Consumer Right's practice assists clients with credit reporting, fair debt collection practices, bankruptcy, alternatives to bankruptcy, and judgment enforcement actions.

The **Center for Employment Opportunities (CEO)** is a non-profit dedicated to providing immediate comprehensive employment services exclusively to formerly incarcerated men and women. CEO has 11 offices nationwide across 4 states and serves over 4500 people under criminal justice supervision annually. As an organization dedicated to helping people secure employment after incarceration we know firsthand how important ICRAA and FCRA's protections are to people at this critical moment in their lives. We support this effort to preserve these critical protections.

The **Collateral Consequences Resource Center** is a non-profit organization established in 2014 to promote public discussion of the legal restrictions and social stigma that burden people with a criminal record long after their court-imposed sentence has been served. Through its website, the Center provides practice and advocacy resources for lawyers and others, and news and commentary about this dynamic area of the law. The Center has a particular

interest in improving the mechanisms for relief from the adverse effects of a criminal record that exist in different jurisdictions, and thus in the subject matter of this litigation.

The **Community Service Society of New York ("CSS")** has led the fight against poverty in New York City for more than 173 years. CSS primarily focuses on promoting living-wage jobs and works to support and stimulate social and economic mobility among the working poor. Because mass imprisonment perpetuates poverty, CSS promotes the implementation of policies and enforcement of laws to speed the successful reentry of people with criminal records via employment. The organization's Next Door Project utilizes a large cadre of senior citizen volunteers to help individuals request, read and repair their New York and Federal Bureau of Investigation ("FBI") rap sheets. CSS also litigates against public and private employers that violate state and federal laws that implicate the rights of individuals with criminal conviction histories.

Amicus Curiae **Drug Policy Alliance (DPA)** is the nation's leading organization devoted to broadening the public debate over drug use and regulation and to advancing pragmatic drug laws and policies grounded in science, compassion, health and human rights. DPA has long been committed to rational sentencing policies aimed at reducing the disparate impact of the nation's drug laws, and diverting those with nonviolent drug offenses from the criminal justice system and incarceration settings into productive community-based services. DPA supports policies that facilitate successful reentry and reduce the likelihood of

recidivism, including policies that remove barriers to employment, housing, and educational opportunities for people with nonviolent offenses.

The **East Bay Community Law Center (EBCLC)** is the non-profit poverty law clinic of the UC Berkeley Law School. EBCLC's Clean Slate Practice provides free legal services to 1,200 clients each year who have criminal records and are now working to reenter their communities as full and contributing members. These clients face daunting barriers to employment and housing, sometimes as the result of decades-old convictions, and often despite their hard-won success in rehabilitation. Almost all of EBCLC's reentry clients have benefited directly from the protections of California's Investigative Consumer Reporting Agencies Act (ICRAA).

The **Ella Baker Center for Human Rights (EBC)**, based in Oakland, advances racial and economic justice to ensure dignity and opportunity for low-income people and people of color. The EBC organizes with individuals who have criminal records and their families. The daunting barriers to employment and housing that individuals with a criminal record face have negative impacts on their families' abilities to thrive. Many of our members benefited directly from the protections of the ICRAA compromised by the trial court's ruling in this case.

**Equal Rights Advocates (ERA)** is a national civil rights organization based in San Francisco whose mission is to protect and expand economic and educational access and opportunities for women and girls. Since our founding in 1974, ERA has engaged in direct legal services, high impact litigation, and

legislative advocacy aimed at eradicating gender-based discrimination in the workplace and addressing other systemic barriers to the economic advancement of women and girls. ERA has heard from and provided legal assistance to highly qualified women who are ready and willing to work, but cannot find employment due to their criminal conviction histories, and are struggling to support themselves and their families as they try to reintegrate into society.

The **Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR)** is a civil rights and legal services organization that advances, protects, and promotes the rights of communities of color and immigrants and refugees. LCCR's Second Chance Legal Clinic serves primarily low-income people of color who are seeking to overcome legal barriers due to past arrests and convictions- many of whom seek the benefits of ICRAA to ensure that their backgrounds are not inappropriately reported.

**Legal Action Center (LAC)**, founded in 1973, is a national non-profit law and policy organization, based in New York City, New York, that works to fight discrimination against and promote the privacy rights of individuals with criminal records, alcohol/drug histories, and/or HIV/AIDS. LAC provides direct services to approximately 2,000 clients per year. Our National H.I.R.E. (Helping Individuals with criminal records Reenter through Employment) Network works with policy makers and advocates nationwide to promote employment and other opportunities for individuals with criminal records. Through policy advocacy and impact litigation, LAC works to ensure compliance with the fair credit reporting

laws at both the federal and state level and to promote best practices. The questions posed on appeal are of vital concern to LAC's constituency across the country, who are trying to better their lives despite past involvement with the criminal justice system.

The **Legal Aid Foundation of Los Angeles (LAFLA)** has been the frontline law firm providing free civil legal services to low-income people in Los Angeles County for over 85 years. LAFLA assists over 80,000 low-income individuals annually. LAFLA has served many clients who have had brushes with the law as juveniles or as adults in the past who are now seeking to move on with their lives, get jobs and reach self-sufficiency. LAFLA assists individuals with filing petitions for dismissal, correcting arrest records, sealing juvenile record and resolving citations to reinstate driver's licenses. All of this work is done in an effort to remove barriers to employment. One of the major stumbling blocks to our clients' ability to secure employment is the inaccurate information regarding past criminal records and arrests relayed to prospective employers by reporting businesses.

Since 1958, **Legal Aid of Marin** has been protecting jobs, homes, and families for low-income, vulnerable, and otherwise underserved residents of Marin County. The current housing crisis inflicts severe hardships for our clients, and far too often they also suffer from inaccurate and unfair "background reports" that cause lost opportunities for their families.

**Legal Services for Prisoners with Children (LSPC)** organizes communities impacted by the criminal justice system and advocates to release incarcerated people, to restore human and civil rights, and to reunify families and communities. LSPC believes that the one of the greatest barriers to successful community reentry and family reintegration following incarceration is employment discrimination based on conviction history. LSPC supports the full human and civil rights of people with convictions, including the right to support one's family.

**Legal Services of Northern California** is a non-profit legal aid organization which provides free legal services to thousands of clients annually, striving to deliver quality legal services that empower the poor to identify and defeat the causes and effects of poverty within their community. LSNC's eight offices and various programs regularly represent individuals with possibly prejudicial criminal and consumer records in a variety of contexts, including housing, public benefits, civil rights, health, education, and criminal records remedies for those who face significant barriers to employment and housing due to their criminal records. Particularly vulnerable groups include survivors of domestic violence, whose arrest records developed as a result of reporting domestic violence may appear on background checks, and former foster youth who have reported seeing their juvenile records appear in background checks. Accordingly, many clients LSNC serves each year rely on ICRAA and FCRA's protections to be treated fairly in a variety of contexts, most notably the housing and job markets;

these significant protections would be greatly compromised by the district court's ruling in this case.

The **National Consumer Law Center (NCLC)** is a nonprofit organization that has served as one of the nation's leading advocates for economic justice since 1969. NCLC has unique expertise and interest in fair credit reporting issues and publishes Fair Credit Reporting (8th ed. 2013), a comprehensive analysis of the FCRA, state credit reporting laws, and related issues. In 2012, NCLC conducted an extensive analysis of the background screening industry and documented common mistakes and poor practices.

**Neighborhood Legal Services of Los Angeles County (NLSLA)** is a nonprofit legal aid agency that has been providing free civil legal services to low-income families and individuals in Los Angeles County since 1965. NLSLA provides legal assistance in the areas of housing, consumer, health, government benefits, criminal record clearance remedies, employment, community development, immigration, and family law. While NLSLA assists countless clients with removing barriers created by their criminal record at our various program and community clinics, many continue to experience significant hurdles in obtaining adequate housing and employment because of errors contained in their background checks. The negative implications can be far reaching in its impact on the individuals' journey to self-sufficiency and ultimate advancement out of poverty.

The **North Carolina Justice Center** is a 501(c)(3) organization with the mission of eliminating poverty by ensuring that every household has access to the resources, services and fair treatment it needs to achieve economic security. The North Carolina Justice Center's Second Chance Initiative advocates for policy reforms that remove unnecessary barriers to employment, housing, and other resources essential to productive citizenship for community members with criminal records. The Investigative Consumer Reporting Agencies Act provides important protections for applicants with criminal records trying to secure stable employment and housing and serves as a model for efforts to extend similar protections in other states.

**Public Counsel** is the largest pro bono law firm in the nation. It annually assists more than 30,000 families, children, immigrants, veterans, and nonprofit organizations with issues related to systemic poverty and civil rights, including issues specific to gaining and keeping employment, government benefits, and affordable housing. Inaccurate consumer reports and background checks threaten the ability of Public Counsel's clients to obtain and keep jobs, government assistance, and safe and reasonably priced homes. Public Counsel views the ICRAA as a necessary and reasonable measure to protect California residents by ensuring that reporting companies exercise appropriate diligence and care.

The **Public Interest Law Project**. The Public Interest Law Project is a California non-profit corporation providing advocacy support, technical assistance and training to local legal services offices throughout California on issues related to

affordable housing, public benefits and civil rights. With catastrophic increase in rents and housing prices in much of California, preventing arbitrary disqualification of lower income households from eligibility for housing due to inaccurate credit reporting has become a significant barrier to adequate housing for thousands of households.

**Public Law Center** is a nonprofit legal services organization, committed to providing access to justice for Orange County, California's low-income residents. PLC fulfills its mission through direct legal services, impact litigation, policy advocacy and legislative support. Public Law Center works with individuals who have been turned down for housing or employment because of errors in their background checks and therefore face countless other legal issues as a result of homelessness or unemployment. ICRAA is crucial to providing protections for these individuals.

**Root & Rebound** is a reentry advocacy and legal education center that works to increase access to justice and opportunity for people in reentry from prison and jail, and to educate and empower those who support them, fundamentally advancing and strengthening the reentry infrastructure across the state of California. In a country with 44,000 documented legal barriers for people with criminal records, and where criminal records have contributed to an estimated 20% of the U.S. poverty rate, ICRAA provides important protections for people with criminal records in moving forward with their lives and securing

employment. These critical protections must be upheld in order for people with records to have a second chance in society.

Founded in 1973, **Rubicon Programs**' mission is to transform East Bay communities by equipping people to break the cycle of poverty. Rubicon supports participants across Contra Costa and Alameda Counties who are actively searching for employment by addressing barriers to finding and retaining jobs. In 2015 alone, we have served over 4000 participants, 39% of whom have had contact with the criminal justice system. For these people, having a criminal record can be a significant barrier to employment. The significance of ICRAA's protections cannot be overstated when it comes to helping this population access employment after incarceration. ICRAA's protections afford them the opportunity to move past their mistakes, become successful members of society, and move out of poverty.

**Western Center on Law and Poverty (WCLP)** is the oldest and largest statewide support center for legal services advocates in California. WCLP and partner organizations are engaged in ongoing advocacy to remove barriers to work, including reforming unfair driver's license suspension rules and practices and challenging inaccurate criminal background checks on public benefits recipients applying for jobs. Ensuring that the full scope of ICRAA protections is available to low-income Californians seeking to lift themselves and their families out of poverty by securing stable employment is critical to WCLP's anti-poverty mission.

## II. Interest of *Amici Curiae*

The proposed *amici curiae* include a diverse group of non-profit organizations involved in policy work, litigation, and direct services for indigent clients with substantial barriers to employment and housing. The issues presented in this case implicate the interests of millions of Californians, including *amici* organizations' California clients, who are at the mercy of screening companies to accurately and fairly report their public records when they apply for housing and employment. ICRAA empowers these clients to ensure accurate reporting of their public records. This case, which addresses the validity of ICRAA, has a profound impact on our clients' ability to obtain redress under California's consumer reporting statutes.

Non-California-based *amici* champion ICRAA as a vitally important protection against the constellation of harm that can befall individuals subject to inaccurate, poor-quality background checks.

## III. Need for Further Briefing

The proposed *amici curiae* believe that this brief will provide the Court with important perspectives not yet offered in the parties' briefing, but helpful to the Court's assessment of the parties' arguments on the constitutionality of ICRAA. We submit this *amicus* brief to (1) provide the Court with real-world stories that show why ICRAA offers critical and indispensable protections for job and rental housing applicants in California; and (2) demonstrate that Respondents' contention that ICRAA fails to provide fair notice of what is required of employers

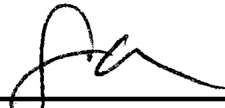
and screening companies is not rooted in a sincere concern about due process, but in a plain desire to avoid the stricter disclosure requirements in ICRAA.

## IV. Conclusion

For the foregoing reasons, *amici curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: April 27, 2016

Respectfully submitted,

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## INTRODUCTION

The impetus for the 1998 amendments to the Investigative Consumer Reporting Agencies Act (ICRAA) was an *L.A. Times* article about Bronti Kelly, whose story is as heartbreaking as it is maddening. A former Air Force Reservist with extensive retail sales experience, Kelly ended up bankrupt and homeless after being denied hundreds of department store jobs over the course of four years. Kelly later learned he had been the victim of identity theft, and that screening companies had been falsely reporting that he shoplifted from a prior employer. The Consumer Credit Reporting Agencies Act (CCRAA) required employers to notify applicants if a screening report would be run, and if an application was denied based on a report, but not once in four years did Kelly receive either notice.

Senator Leslie found this appalling, and expanded the scope of ICRAA to provide greater disclosure and accountability standards for job and housing applicants. A 2002 amendment further strengthened the disclosure requirement for employee screening reports.

At issue in this appeal is a straightforward provision in ICRAA that requires employers to provide job applicants a disclosure and authorization form before ordering a screening report on them. This form must disclose the name and contact information for the screening company. The policy underlying this provision is equally straightforward: employment is one of life's basic needs, so fairness dictates that an applicant should be given notice and an opportunity to contact the screening company to dispute any inaccuracies in its report.

Defendants ("First Student") now complain that it is they who have been deprived of fair notice because, after the 1998 ICRAA amendments, they have no notice of whether employee screening reports are governed by ICRAA or CCRAA. This argument is rooted in the Fourth District's decision in *Ortiz v. Lyon Management Group, Inc.*, (2007) 157 Cal. App. 4th 604, which overlooked that tenant screening reports containing unlawful detainer information are explicitly regulated in both CCRAA and ICRAA, then inexplicably construed the statutes to be separate statutes governing distinct *types* of information. The truth of the matter is that the screening industry is not at all confused about the scope of ICRAA. This case is just the latest cynical vagueness challenge that seeks to leverage *Ortiz's* improper statutory construction to gut California's strong protections for employee and tenant screening reports containing public records information.

*Amici* submit this brief to provide real-world stories which show that many of the abuses by the employee and tenant screening industry that inspired the 1998 ICRAA amendments continue to this day, with devastating impacts on our clients. *Amici* regularly see qualified applicants lose employment and housing opportunities as a result of inaccurate public records reporting, untimely disclosures, and insufficient dispute reinvestigation procedures. If the validity of ICRAA is not reaffirmed, many Californians will lose a crucial set of protections that empower them to protect their reputations, privacy rights, and access to job and housing opportunities.

## DISCUSSION

### I. Bronti Kelly's plight prompted the 1998 ICRAA amendments, which strengthened protections for employee and tenant screening reports.

In 1990, Bronti Kelly's wallet was stolen along with four dollars, his driver's license, Social Security card, and military I.D. for the Air Force Reserves.[1] When he first reported this petty theft, he never foresaw the nightmare that would follow.

Seven months later, in early 1991, Kelly was working as a part-time salesman in a Robinsons-May department store when the personnel director called him into his office to tell him that he had been caught shoplifting at another Robinsons-May store. Kelly knew this was false, and presented a letter from his commanding Air Force officer that confirmed he had been on duty when the shoplifting occurred. Three weeks later, Kelly was laid off, purportedly because the store's staffing needs were being reduced at the end of a busy retail season.

Over the next four years, Kelly was rejected for hundreds of department store jobs even though he had extensive retail sales experience. The few times that he was hired, he was terminated within days without any explanation. He could not figure out why no one would employ him, and he eventually ended up bankrupt, sleeping in parking garages, and showering at the pool in his old apartment complex just to keep up appearances.

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[1] David E. Kalish, *Man Persecuted With False Cyber-Information*, Los Angeles Times, Oct. 5 1997 *available at* http://articles.latimes.com/print/1997/oct/05/news/mn-39477. The details about Bronti Kelly's story recounted in this brief are from this article, which was often cited by Senator Leslie in the legislative history. *See, e.g.*, Plaintiff-Appellant's Request for Judicial Notice "RJN" Exh. G at 2.

When yet another department store hired him, then promptly fired him before his first day, Kelly broke down crying and pleaded for an explanation. The manager told him to write a letter to Store Protective Association (SPA), an employee screening company that served over a hundred chain retail stores.

This was the first time in four years that an employer had ever told Kelly about SPA or any other employee screening company.

Kelly wrote a letter to SPA asking for an explanation. A few months later, SPA replied that their records showed he had been charged with shoplifting at a Robinsons-May store—the same alleged shoplifting incident that he thought he had cleared up with his Air Force commander's letter in 1991. After further investigation, Kelly discovered that another man had stolen his identity and then given Kelly's name to the police several times when being arrested for shoplifting, burglary, and arson. The other man's arrests and convictions were appearing in computer databases of public records information that were being used by employers and employee screening companies to evaluate job applicants.

After four long years of blaming himself for hundreds of rejections, Kelly's self-blame turned into outrage that none of these employers had ever even notified him that a screening report[2] would be run, nor given him the name of the screening company. "That infuriates me," Kelly said. "Why not tell someone if they run a background check on them?"

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[2] We use "consumer report," "screening report," and "background check report" interchangeably to mean a report about a person that is provided to a third party for a fee.

California State Senator Tim Leslie agreed. A 1997 *L.A. Times* article about Bronti Kelly's plight prompted Senator Leslie to introduce SB 1454, a bill to strengthen the protections for employee and tenant screening reports. At that time, the Consumer Credit Reporting Agencies Act (CCRAA), Civil Code §§ 1785.1 *et seq.*[3] and the Investigative Consumer Reporting Agencies Act (ICRAA), §§ 1786 *et seq.* both governed criminal background check reports for employee and tenant screening purposes. (1785.3(c), (1786.2(b)) However, the stricter remedies in ICRAA were only available to job and housing applicants if the report contained information "obtained from personal interviews." (Former § 1786.2(c), added by Stats. 1975, ch. 1272, p. 3378).

Senator Leslie removed this anachronistic "personal interviews" limitation because he believed 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, renting a[ ] dwelling or obtaining an insurance policy,[4] then it should be subject to greater disclosure and accountability standards." (Plaintiff-Appellant's Request for Judicial Notice "RJN" Exh. H at 3). These 1998 amendments increased the remedies in ICRAA to discourage the proliferation of inaccurate data, and strengthened the disclosure requirements to empower individuals to manage their reputations and correct

[3] All statutory citations are to the California Civil Code, unless otherwise indicated.
[4] Due to a last minute carve-out amendment in 1998, reports for insurance purposes are still limited to information "obtained through personal interviews." § 1786.2(b).

misinformation in their reports. (RJN Exh. G at 4). Since then, the background check industry has exploded, and these protections are even more important today.

## II. The stricter disclosure and accountability standards in ICRAA are critically important for job and housing applicants.

### A. Public records information is routinely misreported in the Wild West of screening companies.

Roughly ninety-three percent of employers conduct criminal background checks on some potential applicants, and seventy-three percent of employers conduct criminal background checks for all potential applicants.[5] It is difficult to know how many screening companies currently exist because there are neither licensing requirements nor any required system for registration.[6] But there are now dozens of large corporations and hundreds—perhaps thousands—of smaller ones across the United States that disseminate millions of criminal records compiled from a range of local, state, and federal sources.[7] The barriers to entry in the industry are quite low, as anyone with an Internet connection and access to public records can hang a shingle and start a screening business. (NCLC Report at 8). These companies use a variety of methods to collect information. Some of the

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[5] Soc. For Human Res. Mgmt., Background Checking: Conducting Criminal Background Checks (Jan. 22, 2010), *available at* http://www.shrm.org/Research/SurveyFindings/Articles/Pages/ConductingReferenceBackgroundChecks.aspx

[6] National Consumer Law Center, *Broken Records: How Errors byCriminal Background Checking Companies Harm Workers and Businesses* 8 (2012) *available at* https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf ("NCLC Report")

[7] SEARCH, The National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information 22-28, *available at* http://www.search.org/files/pdf/RNTFCSCJRI.pdf.).

more common are "court runners" or researchers who examine physical records at the courthouse, bulk purchasers of public records database information, and "gateway" access to another company's databases. *Id.* at 9.

The National Consumer Law Center has likened the background screening industry to the "Wild West" because there are no well-established standards for ensuring the accuracy of the records, and too many incentives to cut corners when reporting criminal and other public records information. (NCLC Report at 5, 31). *Amici* regularly see screening reports that include inaccurate, incomplete, or misleading criminal record information. Below are just a few of our clients' stories that illustrate the types of problems we see.

***Name mismatches and mixed files***. We routinely see clients whose screening reports contain someone else's criminal records. These "mixed file" reports are a very common problem, and are often the result of woefully inadequate procedures. One client was the subject of a tenant screening report that contained eighteen pages of criminal records that did not belong to him, and the screening company had assigned him this lengthy criminal record based only on a match of his first and last name.

***Identity theft victims***. Fifteen years after Bronti Kelly's horror story was publicized, "John Doe" faced a strikingly similar ordeal. Doe lost his wallet in 2002, and soon thereafter another man gave Doe's name to the police as he was being arrested for selling cocaine, a felony. In early 2003, Doe went to the sentencing hearing to report the identity theft, and the judge confirmed that Doe was not the

man who had been arrested. The police department took his fingerprints that same day, then amended its records to reflect that the other man uses Doe's name as an alias. At that point, Doe thought he had fully cleared his name.

In 2012, Doe was offered an entry-level job at a retail store, pending completion of a criminal background check by HireRight (the same company that provided screening reports to First Student). The employer revoked its offer when HireRight falsely reported that Doe had been convicted of a felony in 2003. Doe promptly told HireRight and the employer that this was another man's felony and scrambled to assemble evidence of his identity theft from nine years prior. When he went to get the police department records, he was told this was a very common problem. Nearly every day in San Francisco, someone gives the name of a family member, neighbor, or acquaintance at the time of their arrest. The police and the court track these known aliases, including identity theft victims like Doe, by using an "AKA" designation in their records. Thus, Doe's name appears in the other man's court record with an AKA next to it, and the actual arrestee, who has a different first and last name than Doe, is listed as the named defendant without an AKA. These AKA aliases are so common that nearly every page of the criminal records index books in the San Francisco Superior Court has at least one name with an AKA designation. In other words, if you're in the business of researching court records in San Francisco, then you have seen a name with an AKA.

When Doe later requested a copy of his full file from HireRight, he was shocked to learn that HireRight had known both 1) the actual name of the

defendant and 2) that the court records listed Doe's name with an "AKA" next to it, but had still inexplicably decided to *omit* both of these key pieces of information before issuing its report to the employer. HireRight nonetheless maintains that it satisfied all its obligations under the law. After further investigation, Doe learned that at least one other company had previously made this same error.

These types of reporting errors still plague many identity theft victims. A client of another *amici*, Angela,[8] discovered that an acquaintance had assumed her name on multiple occasions when being arrested for vehicle theft. Angela worked to clear her name and even filed an identity theft affidavit. But when she applied for a job, she was denied due to a background check that reported her acquaintance's criminal history. Angela later started a new job at another retailer, but was subsequently terminated after a second screening company reported the exact same criminal history. Neither of these were fly-by-night operations. They were both nationwide screening companies that should have had strict procedures in place for recognizing victims of identity theft in criminal court records.

***Misinterpreting public records***. Many of the errors in criminal background check reports seem to arise from a systematic failure to train court researchers to properly interpret criminal records. We regularly see reports that reveal a fundamental misunderstanding about some of the most basic information found in a criminal court docket. Below are just a few examples.

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[8] All client names have been changed to protect their privacy.

*First*, screening companies routinely misclassify the severity of the offense, such as reporting a misdemeanor as a felony. This can damage an applicant's credibility and cost him a job. For example, Bruce disclosed during a job interview that, as a teenager, he had pled guilty to a misdemeanor for petty theft. The employer thanked him for his honesty and reassured him that only a felony would be disqualifying. When the employer received a background check that reported this plea as a felony, he was terminated. Bruce showed the employer the court website, which clearly showed a misdemeanor plea, but he was told that the screening company would need to confirm this before he could be reinstated. Bruce then called twice to dispute the report, and on both occasions the screening company insisted that their report had been correct. They finally corrected their error after a *pro bono* attorney disputed the report on Bruce's behalf, but the employer told him it was no longer interested in hiring him.

*Second*, we often see pre-plea and post-plea diversion programs reported as convictions, even after the diversion period has concluded. This violates clear statutory mandates and subverts the important policy interests served by these programs. For example, Penal Code section 1000.4(a), states that "[a] record pertaining to an arrest resulting in successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment." One of the goals of this pre-plea diversion program is "to restore him to productive citizenship without the lasting stigma of a criminal conviction." *People v. Orihuela* (2004) 122 Cal. App. 4th

70, 72. Yet many screening companies are either unaware of, or don't seem to understand the legal significance of, these diversion programs. One *amici* client lost his job after his pre-plea diversion was reported as a guilty conviction. (This client had disclosed his arrest during his interview, but the reported conviction made him look dishonest.) When a volunteer attorney at the legal clinic called to dispute the report, the screening company's compliance officer revealed that she had never even heard of a diversion program, and said, rather shockingly: "well, my understanding is that if we get a name from the court, that means they're guilty."

*Third*, screening companies frequently report convictions that have been dismissed pursuant to Penal Code section 1203.4, another reporting violation that undermines clients' ability to overcome the stigma of their criminal record and fully rejoin their communities as contributing members. Similar to the diversion statutes, Penal Code section 1203.4 is a remedial statute designed to provide a mechanism for petitioners to remove "the blemish of a criminal record," and "reward an individual" who has demonstrated rehabilitation by restoring him "to his former status in society to the extent the Legislature has power to do so." *People v. Guillen* (2013) 218 Cal.App.4th 975, 998. Screening companies' routine misreporting of dismissed convictions severely undermines these interests.

Before applying for a new job, Chris submitted a successful 1203.4 petition to set aside and dismiss a nine-year old misdemeanor conviction. The background check failed to recognize the 1203.4 petition and incorrectly reported the date of his 1203.4 dismissal as the disposition date of the underlying conviction. This error

both deprived Chris of the benefit of the dismissal and gave the false impression that he had been recently convicted. Screening companies routinely misinterpret the date of a 1203.4 dismissal as the conviction date, and this can discourage people from seeking a 1203.4 dismissal out of fear that it will "renew" an old plea.

Also, screening companies often report a single 1203.4 dismissal as multiple convictions. One client, David, was terminated when his single dismissed misdemeanor plea was reported as multiple, non-dismissed felony convictions. The screening report was cleared after he disputed, but the employer still rescinded the offer, saying they had "adjusted the staffing levels." Another client, Elena, was the subject of a report that both included her obsolete 13-year old misdemeanor plea and failed to recognize that the plea had been dismissed under 1203.4. The report was corrected with help from an attorney at one of *amici's* clinics, but the employer still wanted to know more details about the original plea. Elena explained that this old plea had been dismissed, and that Labor Code section 432.7 prohibited employers from terminating her based on this 1203.4 dismissal. The employer allowed her to continue the introductory training for two weeks, but then fired her after deciding that, upon further review, the letters of recommendation she had submitted with her initial application had not been satisfactory.

As the Ninth Circuit recently stated, these types of errors "illustrate[ ] how important it is for . . . a company that traffics in the reputations of ordinary people[ ] to train its employees to understand the legal significance of the documents they rely on." *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1071 (9th Cir.

2008) (holding Experian liable for a failure to reinvestigate a dispute when the court documents unambiguously showed that there had been no judgment against the plaintiff). Yet sometimes the errors we see are so egregious it seems the researcher had never been trained to interpret court records. Frank had pled guilty to a misdemeanor arising from a minor violation of a court order, and several years later his plea was dismissed following a showing of rehabilitation. A background check reported this dismissed misdemeanor as a conviction for "felony abduction." It also listed the date of his recent 1203.4 dismissal as the disposition date for his purported felony abduction conviction. He didn't get the job.

***Aggregating incomplete and outdated database information.*** Increasingly, the screening industry is relying on public records databases as the primary source for their criminal background checks. Some companies only use these databases as a starting point, and will send a court researcher to verify the information before issuing a report. But other companies, especially those that advertise themselves as "instant" background checks, will report aggregated database information without any further review. This often results in several predictable types of inaccuracies such as mixed files, duplicative records, and outdated information that doesn't reflect later dismissals or identity theft affidavits.

This routine reporting of incomplete and outdated public record information has been a concern since Senator Proxmire first introduced the federal Fair Credit Reporting Act (FCRA) in 1969. When describing the need for the FCRA, he noted that "[m]ost consumer reporting agencies assiduously cull

adverse information" from public records but "most agencies are not anywhere nearly as diligent in following up on the case to record information favorable to the consumer." 91 Cong. Rec. 2412 (1969). Even though cases can later be dismissed and judgments revered, "these facts are seldom reported by the consumer reporting agencies with the result that their records are systematically biased against the consumers." *Id.* The FCRA, CCRAA, and ICRAA have long required that screening companies maintain "strict procedures" to ensure that adverse public records information about job applicants is "complete and up to date." (1785.18(b), 1786.28(b)). Yet many employee screening companies still systematically disregard this requirement.

For example, Gina had successfully petitioned for a 1203.4 dismissal of a prior guilty plea. At the hearing, the judge congratulated her for demonstrating her rehabilitation, told her she could now feel confident that a criminal record would not hinder her housing search, and wished her the best of luck in finding a place that would be safer for her and her grandchildren. But when she later applied for an apartment, the tenant screening report listed her prior plea to a single charge as three separate criminal convictions. She discovered that these records had been culled from a database of previously-run background checks, but had not been verified by the screening company during the 30-day period before it issued the report to the landlord, as required by section 1786.18(c) of ICRAA. This company habitually disregards ICRAA's 30-day verification rule.

They are not the only bad actor in the industry. Three different clients recently came to one of *amici's* legal clinics complaining that the same nationwide screening company had reported their 1203.4 dismissals as convictions. One report even listed the client's single dismissed misdemeanor conviction as multiple felony convictions. Even though this company aggressively advertises itself as the most accurate and comprehensive employment screening company on the market, it appears that its policy is to report all criminal records in its database without re-verifying at the courthouse to ensure these records are complete and up to date. This is a clear violation of CCRAA and ICRAA. (1785.18(b), 1786.28(b))

***An inherent bias toward over-inclusion of adverse information.*** This routine reporting of incomplete and outdated criminal records is just one symptom of the consumer reporting industry's strong bias toward over-inclusion of adverse items of information. This inherent bias arises because their customer is not the individual applicant, it is an employer or landlord who wants rapid access to background check reports at low cost. Therefore, their investigation procedures are more focused on ferreting out false statements from applicants than ensuring they do not falsely attribute public records to the wrong person. As a result, these procedures usually err on the side of including adverse items of information, even if there is only a questionable match, which partly explains why mixed files and name mismatches are so common in screening reports containing public records.

The investigations underlying HireRight's false report about John Doe illustrate the consequences of this systematic bias. When HireRight received

documents from its court runner that listed Doe as an AKA and another man with a different first and last name as the actual defendant, it omitted the AKA and the actual defendant's name before issuing the report to the employer. HireRight never contacted Doe about this name discrepancy, nor did it try to understand the legal significance of the AKA designation in the court records; it just omitted all evidence of the discrepancy and attributed the felony to Doe. In stark contrast, when HireRight could not immediately confirm that Doe had attended a local community college for three months, as he had stated on his job application, HireRight called and emailed Doe to verify this information. Two employees logged eight entries about this issue to track their investigation, and ultimately confirmed that Doe had been enrolled for six months, not three. If HireRight had followed equally diligent procedures for these two discrepancies, it would have just picked up the phone or emailed Doe to ask why his name was associated with another man's criminal record. But they didn't, and Doe lost his job offer.

### B. The certification and disclosure requirements bring screening companies out of the shadows and empower applicants to protect their reputations.

Even with the strictest procedures in place, no system can guarantee complete accuracy for every screening report. There will inevitably be human errors, or sometimes a court record itself will be incorrect. In those instances, the individual who is the subject of a screening report must be given notice and an

opportunity to submit a dispute. If not, the inaccuracy will remain in the screening company's files and possibly endanger later job or housing opportunities.

From 1975 to 1991, the principal mechanism for providing notice to the consumer was an "adverse action notice." Both CCRAA and ICRAA required an employer to provide the applicant the name and address of the screening company if she was denied based on information in a report. (1785.20,1786.40). ICRAA further obligated employers to provide an "initial disclosure" to notify the applicant that a report had been ordered, but this was only required if the report contained information obtained through personal interviews. (Former 1786.2(c), 1786.16(b) added by Stats.1975, c. 1272, p. 3380).

In 1991, a similar initial disclosure requirement was added to CCRAA in response to concerns about high rates of misidentified and outdated public records information in consumer credit files, particularly criminal records.[9] (1785.20.5 added by Stats.1991, c. 971 (A.B.1102), § 2) The bill sought to address problems like those of James Russell Wiggins, who was fired from his job after a credit reporting agency confused him with "James Ray" Wiggins, a man who had pled guilty to cocaine possession. (Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 1102 at 2.) The bill's author, Senator Speier, recognized that inaccurate

[9] In dicta, the Court of Appeal below said "it is not entirely clear that the CCRAA applies to the background checks" containing criminal records information. This overlooked that CCRAA has always expressly regulated the reporting of criminal records information. (1785.13). Furthermore, when CCRAA was enacted, arrest and conviction records, and other public records, were commonly maintained in credit bureau files. *Personal Privacy in an Information Society, The Report of The Privacy Protection Study Commission* (July 1977) *available at* https://epic.org/privacy/ppsc1977report/c2.pdf. ("1977 Privacy Commission").

public records were particularly harmful when they appeared in reports for employment purposes, and that an adverse action notice was often insufficient to prevent the harm. This new CCRAA provision required the employer to provide initial disclosure with the source of the report and a box for the applicant to check to request that the report be provided to him at the same time as the employer. (1785.20.5) Its purpose was to allow individuals an opportunity to review the report at the same time as the employer, so that they at least have a chance to try to dispute any errors before the damage is already done. (Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 1102 at 1-2.)

Unfortunately, these disclosure and notice requirements are only effective if the employer actually complies with them. Bronti Kelly could have avoided his four-year ordeal that left him bankrupt and homeless if the employers had just provided him either the initial disclosure or the adverse action notice required by CCRAA. Instead, Kelly was left in the dark for years and never given a chance to confront the false rumors that were damaging his reputation and job prospects.

These notices are especially important for job and housing applicants, because being denied for a job or housing does not necessarily raise any suspicions that a report had been ordered. Qualified applicants for job and housing opportunities are regularly turned down for any number of reasons that may have nothing to do with a consumer report. (Yet if a consumer were denied for credit, she would be quite suspicious if she received a denial from the bank saying that they had received applications from a number of very qualified applicants like

herself, but they had decided to offer the credit card to someone else.) Bronti Kelly had no idea that he has being judged based on a screening report. Instead, he blamed *himself* for his inability to secure employment.

The 1998 ICRAA amendments were designed to bring these screening companies out of the shadows by incentivizing employers and landlords to notify applicants when a screening report would be used. To achieve this, Senator Leslie's bill not only extended the stricter remedies in ICRAA to cover all employee and tenant screening reports (subject to the exception in section 1786.2(c)), it also added section 1786.16(a)(4), which requires all users to certify to the screening company that they have provided the initial disclosure and will issue an adverse action notice if an adverse decision is made based on the report. This certification effectively requires the screening company to educate employers and landlords about their disclosure and notice obligations. Stats. 1998, c. 988 §§ 1, 5 (SB 1454).

The disclosure and certification requirements have been fairly effective in incentivizing employers to comply with ICRAA. Many employee screening companies have developed model forms that their customers can use to provide applicants both the initial disclosure and adverse action notice. Armed with the name of the screening company and a copy of the inaccurate report, some of our clients have even been able to save their jobs with a prompt dispute.

But we still encounter plenty of employers that are not in compliance. One *amici* client was told that he had been fired because his background check reported

two recent felony convictions. He promptly disputed this with the employer, but was told that he had to fix the error at the court, and he wasn't provided the name of the screening company or a copy of the report. When he finally learned that the error was the screening company's, not the court's, he submitted a dispute directly to the screening company and the report was corrected within two hours. But by that time, the job had already been given to another applicant. If the employer had provided timely notice of the screening company's name and address, he might not have lost his job.

Based on our experience, the *tenant* screening industry seems to be largely ignoring the disclosure and certification requirements in ICRAA. Recently, a landlord told one *amici* client that she was denied for an apartment due to her credit report. The landlord initially refused to provide a copy of the report, but eventually relented when contacted by an attorney. The report falsely reported that she had several felony convictions. When her attorney called to dispute the inaccuracies and identified the report by its unique ID number, the screening company representative was surprised to learn that the attorney had been able to obtain an actual copy of the report because "applicants don't usually get to see" the reports issued to landlords. This was shocking to hear, especially from one of the largest tenant screening companies in the industry.

Before *Ortiz*, the strong remedies in ICRAA often enabled *amici* to informally negotiate with employers, landlords, and screening companies to bring their initial disclosure and notice procedures into compliance with ICRAA. After

*Ortiz*, companies often feel emboldened to ignore our clients' concerns, and some will even flatly deny that ICRAA is enforceable. This refusal to comply with the straightforward disclosure and certification requirements allows these screening companies to retreat back into the shadows, which will deprive future applicants of an opportunity to dispute falsehoods in screening reports.

### C. Applicants often cannot un-ring the bell of an inaccurate report, and it can harm them even if it is later corrected.

Oftentimes, even a prompt dispute is not enough to undo the harm of an inaccurate background check. Courts have long recognized that the purpose of the accuracy standards in consumer reporting statutes "is to protect the reputation of a consumer, for once false rumors are circulated there is not complete vindication." *Ackerley v. Credit Bureau of Sheridan, Inc.*, 385 F. Supp. 658, 659 (D. Wyo. 1974) (citing O. Holmes, The Common Law III (M. Howe ed. 1963).

This risk of harm is particularly acute for job and housing applicants. While a creditor has an economic incentive to offer credit after an inaccuracy has been corrected, an employer or landlord may just move on to the next applicant. There is often little incentive to wait for a dispute to be processed, especially when there are plenty of other qualified applicants in a competitive job or housing market. Furthermore, an inaccuracy about public records can be even more harmful because employers and landlords often treat public records information as objective facts, and continue to harbor doubts about the applicant even after the initial report is corrected.

One client, Harry, lost a job after a background check falsely reported that he had recently been convicted of several felonies. The screening company promptly cleared his report after his dispute, and Harry even had an official at the courthouse call the employer directly to explain that the screening company had erred and that he had no convictions. But when he asked to be rehired, the employer said she still believed that the initial report had been correct.

Most employers are not so candid about the prejudicial effect of a false report. Many of our clients who successfully disputed inaccurate screening reports are simply told that the employer's "staffing needs have changed" or that they decided to hire another candidate instead.

Even victims of identity theft like John Doe, who lost a job offer due to HireRight's false report, cannot un-ring the bell of a false report. When Doe's initial offer was revoked, he scrambled to gather evidence of his innocence and promptly faxed the employer both the court documents which showed the name of the actual defendant, and a certified police department record that showed the defendant has different fingerprints and uses Doe's name as an alias. Yet the employer still said that HireRight itself would need to clear the report before he could be reinstated. Doe faxed the same documents over to HireRight, but the conviction wasn't deleted for another 30 days. In the meantime, the employer told Doe that its staffing needs had changed and they no longer needed an entry-level associate at that store.

When Doe had initially applied, he made such a good impression that the employer had him do a second round of interviews that same day and quickly offered him a job. Yet after HireRight's report was finally corrected, Doe submitted several applications to the same employer for entry-level openings at its Bay Area stores, but he was never even granted another interview. The employer's staffing needs had not changed; it is a nationwide corporation with many retail stores around the Bay Area. The only thing that had changed between the initial job offer and his many subsequent applications over a period of eight months was that HireRight had reported another man's felony on his background check report.

Applicants like Doe cannot easily prove that it was an inaccurate screening report that caused them to lose a job opportunity, or that that the employer's staffing needs had not actually changed. But most employers don't order a screening report until after an offer has been extended, so applicants have very good reason to suspect that it was actually the inaccurate criminal background check report that damaged their reputation and cost them the job.

In recognition of this, CCRAA and ICRAA have always demanded a higher standard of care for employee background check reports by requiring that screening companies maintain "strict procedures" to ensure that adverse public records information about job applicants is "complete and up to date." But if the cost for noncompliance is too low, then the screening industry will look at incidents like Doe's as just another cost of doing business. Indeed, many of the errors detailed above could have been avoided if the employee screening companies had

invested minimal time and money to implement stronger accuracy standards and train their researchers to interpret court records. For example, anyone that is paid to investigate criminal records in San Francisco should certainly know what an "AKA" designation means.

The strong remedies in ICRAA are necessary to counterbalance the consumer reporting industry's inherent bias toward over-inclusion of adverse information, and to discourage a race to the bottom by compelling companies to invest in procedures that result in greater accuracy for employee and tenant screening reports. Most employers want cheap reports, and quickly. So there is little economic incentive for a screening company to invest in the *strictest* accuracy procedures, or the *most* robust dispute resolution processes, for if they do they will likely be undercut by a company offering a cheaper report with a more rapid response time. Again, the barriers to entry in the public records reporting industry are quite low; some companies even run their business out of their homes. The more sophisticated companies know that strict compliance might make them less competitive. For example, HireRight feels compelled to advertise on its website that their reports are slightly more expensive because, while "instant" background checks rely on outdated information, HireRight uses court runners to re-verify the record at the courthouse before issuing a report (as required by law). (1785.18, 1786.28). All companies should be dong this, but many aren't. These stricter remedies not only protect applicants, but also the companies like HireRight because they encourage competitors to invest in their own compliance procedures.

### D. The disclosure provision at issue here also empowers job applicants who must play whack-a-mole with inaccuracies.

Over the years *amici* have helped many of our clients successfully dispute inaccuracies on criminal background check reports, often after they have lost a job or housing opportunity. The most common question they ask afterward is: "How can I make sure this doesn't happen to me again?" There is no easy answer to that.

At any given moment, an untold number of databases could contain inaccurate or outdated criminal records information about an individual. There is no centralized dispute mechanism for employee and tenant screening companies, so a successful dispute of one inaccurate screening report does not guarantee that another company won't make the same mistake. In fact, many of *amici's* clients are forced to play whack-a-mole with the same inaccuracy every time a different company makes the same error. There is also no centralized location such as *annualcreditreport.com* where an applicant can check his criminal background history before applying for a job. Furthermore, even if an applicant wanted to order a criminal background check report on himself before applying for a job, many companies won't let you do that.[10] Even if they did, it would be of limited value because there are the hundreds (or maybe even thousands) of companies in the Wild West of the employee and tenant screening industry, and there is no guarantee that ordering just one report would provide an accurate picture of the records that are attributed to you in other companies' databases.

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[10] Last Week Tonight with John Oliver: *Credit Reports*, https://youtu.be/aRrDsbUdY_k?t=14m20s

In short, when an employer orders a background check report, an applicant must roll the dice and hope for the best. This is especially stressful for our clients who have been the victim of an inaccuracy in the past, some of whom are anxious about applying to new positions—especially at their current employer—out of the fear that a new screening report will cost them a job. In fact, when Bronti Kelly was interviewed at the end of his long ordeal, he said that he just decided to stop applying for many types of opportunities.

Even though the deck is stacked against them, the ICRAA disclosure provision that First Student is challenging here does provide one critically important protection to our clients who are playing whack-a-mole with inaccurate screening reports. It requires the employer to provide a written disclosure—*before* ordering the report—that identifies "the name, address, and telephone number" of the screening company. (1786.16(a)(2)(B)(iv)). ICRAA further requires that this notice be provided every time a report is ordered on an individual. This strict pre-notification requirement has benefitted a great number of our clients because it allows them to contact the screening company immediately, before the report is provided to an employer, to try to prevent the dissemination of inaccurate information. In these instances, a screening company will be especially receptive if the applicant can show that a prior report with a different company had been successfully disputed.

When this stricter disclosure requirement was first added to ICRAA in 2002, Littler Mendelson (the firm representing First Student here) published an article

which lamented that this was "bad news" for employers. Robert Blumberg and Rod Fliegel, *Background Investigations Part II: California's Legislature Sees the Light and Eliminates Some Significant Burdens on California's Employers* (September 2002) (attached as Exhibit A). We disagree. This exceedingly straightforward requirement helps assuage *amici's* clients' fears that they will be blindsided by an inaccurate background check report. It also empowers them to apply to a position with some measure of confidence that they will be able to protect their reputations. These disclosures also benefit employers, because honest and productive applicants will not be discouraged from applying to jobs out of the fear that they will be harmed by another inaccurate report.

## III. These vagueness challenges are not about due process, they are just brazen attempts to undo the 1998 amendments.

The screening industry is not actually confused about the meaning of Senator Leslie's 1998 ICRAA amendments. ChoicePoint, the largest provider of pre-employment background checks at that time, sent a letter to Governor Wilson urging a veto of SB 1454 because the bill's removal of the "obtained through personal interviews" limitation would subject its consumer reports containing public records to both CCRAA and ICRAA. ChoicePoint Letter to Governor Wilson, *Senate Bill SB 1454 (Leslie) - Request for Veto*, (September 3, 1998) (attached as Exhibit B). When Senator Leslie fired back a strongly-worded letter confirming that this was the intended purpose of the bill (RJN Exh. H at 3), ChoicePoint protested that this "personal interviews" distinction was "worthy of being

maintained because employers who base their hiring decisions on public record information only" should not "be subjected to greater paperwork and greater costs." ChoicePoint Letter to Governor Wilson, *Senate Bill SB 1454 (Leslie)*, (September 11, 1998) (attached as Exhibit C).

Four years later, when the legislature further strengthened ICRAA by adding the stricter disclosure and written consent requirements at issue in this case, the industry knew what was required of them. In the same article that lamented this as "bad news" for employers, Littler Mendelson cogently explained that this new ICRAA provision requires "written consent from the consumer every time a consumer report is sought" and that "this differs significantly from the FCRA, which permits a single consent form to be signed covering all subsequent reports." (Exh. A at 1). In other words, an employer could be liable for violating ICRAA if it failed to secure a consent form *every time* it ordered a report on a consumer, even though the FCRA specifically permitted a *one-time* consent form. Littler Mendelson (sensibly) advised employers that complying with ICRAA's stricter requirements would bring their forms into compliance with both ICRAA and FCRA. (Notably, this advice is rooted in the bedrock principle of statutory interpretation that Connor identifies in her Answering Brief (at 15, 26) (citing *Powell v. U.S. Cartridge Co.* (1950) 339 U.S. 497, 519).[11]

[11] *Cf.* First Student Reply (at 3) ("[N]either Ms. Connor nor the court below cited to any case, or other legal authority supporting their conclusion that a party can be potentially liable for violating one statute when engaging in conduct expressly permitted by another. While First has looked, it has not found any such authority.")

But in 2007, a bizarre platypus waddled onto the scene in *Ortiz v. Lyon Mgmt. Grp., Inc.* (2007) 157 Cal. App. 4th 604 ("*Ortiz*") and gave the employee and tenant screening industries a new hope that it could avoid the stricter remedies and requirements in ICRAA. The *Ortiz* court began with the mistaken assumption that its task was to categorize the "unlawful detainer information" in a tenant screening report as *either* creditworthiness *or* character information, but not both, to determine whether ICRAA *or* CCRAA applied. *Id.* at 612. The court concluded that unlawful detainer information was a "platypus" that defied categorization into these purportedly distinct categories of "creditworthiness" and "character" information, and held that ICRAA was unconstitutionally vague as applied to these reports because no person of reasonable intelligence could determine *which* of these two statutes applied. *Id.* at 612-13.

The obvious answer was that *both* CCRAA and ICRAA expressly govern reports for tenant screening purposes (1785.3(c), 1786.2(b)) that contain unlawful detainer information. (1785.13(a)(3), 1786.18(a)(4). The central error in the *Ortiz* analysis was the unfounded assertion that "[n]othing in [CCRAA and ICRAA] 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." *Ortiz* at 615. The *Ortiz* court simply overlooked the fact that that *many* items of public records information are expressly regulated as both "creditworthiness" information subject to CCRAA (1785.13) and "character" information subject to ICRAA (1786.18).

*Ortiz* inexplicably reasoned that "*[c]onstruing* the two statutes to govern discrete items of information harmonizes the statutes, rather than collapsing them into one." *Ortiz* at 615. But this construction didn't harmonize CCRAA and ICRAA—it gutted them. *Ortiz* spawned a "void-for-overlap" doctrine that has effectively instructed lower courts to strike down ICRAA whenever they encounter a report with an item of information that is also governed by CCRAA. That means public records, of course. (1785.13, 1786.18). Before long, the industry realized it could leverage this statutory construction to undo the 1998 amendment.

In 2012, ChoicePoint issued a pre-employment background check about Jane Roe which reported that Roe had pled guilty to a felony in March 2005. This was false. The case docket at the court states, in the equivalent of 28-point font: "Case dismissed due to civil compromise." Roe was understandably upset that this false background check had cost her a job opportunity, and fearful that it might happen again when applying for jobs, so she filed a lawsuit against LexisNexis (which had acquired ChoicePoint) seeking damages and injunctive relief. Roe alleged that ChoicePoint had violated both FCRA and ICRAA by failing to "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b), 1786.20(b).

Rather than defend the adequacy of its procedures, ChoicePoint asserted that ICRAA is unconstitutionally vague and unenforceable because, after the 1998 amendments, one cannot know if a pre-employment criminal background check is subject to ICRAA *or* CCRAA. This was disingenuous. ChoicePoint knew that its

report containing public records was subject to *both* statutes; it had urged a veto of the 1998 amendments for this very reason. (Exh. B) The first page of ChoicePoint's report also included the disclosure that is required by section 1786.29, which was added to ICRAA in 2002. And there was certainly no confusion about what conduct the law required: FCRA, ICRAA, and CCRAA all required ChoicePoint to "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b), 1786.20(b), 1785.14(b).

The federal district court examined the text of each statute and correctly concluded that the criminal record information "clearly subjects" the report to ICRAA and CCRAA, but, in reliance upon the flawed statutory construction in *Ortiz*, held that ICRAA is unconstitutionally vague because it "failed to provide adequate notice" that ICRAA covered the report. *Roe v. LexisNexis Risk Solutions, Inc.*, 2013 U.S. Dist. LEXIS 88936 12 (C.D. Cal. Mar. 19, 2013).[12]

This holding is self-contradictory. If a report is "clearly subject" to ICRAA and CCRAA, then both statutes provided notice that they covered the report. After all, a defendant charged with burglary could not escape culpability by claiming he lacked adequate notice of whether the burglary or larceny statute would apply. *See Blakely v. Washington*, 542 U.S. 296, 309 (2004). Both statutes prohibit the taking of another's property, and the legislature twice provided notice of what the state forbids.

[12] This case settled after the district court denied Roe's motion for entry of a partial final judgment, which would have allowed an immediate appeal to the Ninth Circuit.

*Ortiz* continues to undermine the intended purposes of the 1998 amendments, as evidenced by the case of John Doe. When Doe discovered that HireRight, a nationwide screening company with substantial resources, did not appear to have any procedures in place for accurately reporting court records with "AKA" designations, Doe was outraged. After losing his job offer and being denied for several other openings at the same retailer, Doe eventually filed an ICRAA claim against HireRight for failing to "maintain strict procedures" designed to ensure that the adverse public record information in its report was "complete and up to date." (1786.28(b)). An identical provision in CCRAA required the same of HireRight. (1785.18(b)). In response, HireRight invoked *Ortiz* and asserted that Doe's claims are invalid because ICRAA is "unconstitutionally vague."[13] If the San Francisco Superior Court follows *Ortiz*, it would effectively be ruling that these clear statutory requirements are rendered unconstitutionally vague because the legislature wrote them down twice.

## IV. Conclusion.

We urge this Court to squarely reject the flawed analysis in *Ortiz* that has spawned a nonsensical void-for-overlap doctrine, and confirm the continued vitality of the consumer protections in ICRAA.

[13] This case was stayed due to HireRight's bankruptcy. *John Doe v. HireRight, Inc.*, No. CGC-13-535966 (San Francisco Sup. Ct.).

Dated: April 27, 2016

Respectfully submitted,

Craig Davis (SBN 268194)
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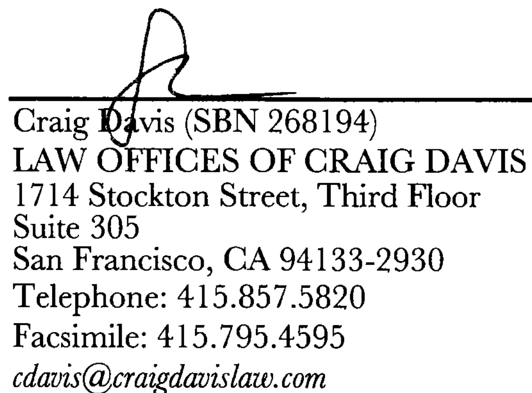
## CERTIFICATE OF COMPLIANCE

I, Craig Davis, counsel for *amici curiae*, hereby certify, pursuant to the California Rules of Court, Rule 8.204(c), that according to the word count in Microsoft Word, this brief contains 8,413 words, including footnotes and headings but exclusive of tables and signature blocks, this certificate of compliance, and the declaration of service.

Dated: April 27, 2016

Respectfully submitted,



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# Exhibit A

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**Background Investigations Part II:**
California's Legislature Sees the Light and Eliminates Some Significant Burdens on California's Employers

**By Robert Blumberg and Rod Fliegel**
**September 2002**

For years, an employer's obligations under the California's Investigative Consumer Reporting Agencies Act (ICRA), Civil Code section 1786 et seq., mirrored their obligations under the Federal Consumer Reporting Act (FCRA), 15 U.S.C. section 1681 et seq. Last year, based upon the stated goal of combating the growing crime of "identity theft," California's Legislature substantially revised the ICRA, greatly increasing the burden on California's employers. Once most employers recognized what had happened, it was too late. The law had already been passed and was in force, leaving many employers scrambling to comply with the law's new requirements. Now, based upon the significant outcry of employers in the state, and substantial lobbying efforts, the Legislature has agreed to "clarify" the ICRA in several significant regards. This bill has been signed by Governor Davis and is effective immediately.

**The Amendments That Were Enacted Last Year**

By enacting Assembly Bill 655 (AB 655) last year, the Legislature significantly expanded the ICRA. The amendments required an employer to notify applicants or current employees every time a background check was obtained, and set forth specific requirements regarding timing and what information must be provided. AB 655 also contained two dramatic changes to existing law: First, it specifically required that an employer provide a copy of the report to the consumer within seven days of receipt, whether requested or not. Second, the law extended its scope to cover background checks and investigations conducted in-house by an employer, without the use of a consumer reporting agency.

**The Newly Enacted Amendments**

1. Employers must obtain notice and consent every time an investigative consumer report is obtained.

First the bad news: While apparently seeking to ease the burden on employers, the Legislature has increased employers' burden in one significant respect. Whereas the FCRA has always required written consent prior to seeking a consumer report, the ICRA previously only required notice. Now the ICRA has expanded the notice requirement to include an explicit provision requiring written consent from the consumer every time a consumer report is sought. This differs significantly from the FCRA, which permits a single consent form to be signed covering all subsequent reports.

Specifically, the ICRA now requires that prior to requesting a report, an employer must provide a written disclosure to the consumer containing the following information:

- The fact that an investigative consumer report may be obtained.
- Identifying the permissible purpose for obtaining the report, i.e., for employment purposes such as hiring or promotion.
- Indicating that the report may include information on the consumer's character, general reputation, personal characteristics, and mode of living.

- Identifying the name, address, and telephone number of the investigative consumer reporting agency conducting the investigation.

- Notifying the consumer of the specific nature and scope of the investigation requested, and providing the consumer with a summary of his or her right to view the information compiled by the consumer reporting agency.

- Providing that the consumer must authorize in writing the procurement of the report on the disclosure form.

The authorization form must be separate from other documents, and cannot be contained in the application or handbook. Thus, employers must now have a single form that not only provides information to the consumer, but also requires the consumer to acknowledge, on that form, their consent to having the report made. A single consent form may, however, be used to comply with both the ICRA and FCRA.

2. Notice and consent is not required for investigations into misconduct or wrongdoing.

Last year's amendments created ambiguity regarding whether notice was required for investigations into suspected employee misconduct, such as theft or sexual harassment. One provision seemed to exempt all such investigations. Another provision appeared to exempt only investigations into suspected criminal activity (e.g., theft). By the new amendments, the first provision has been expanded to include any suspicion of misconduct or wrongdoing. The second provision, which created the ambiguity, was eliminated. Further, these provisions have been clarified by a new provision specifically indicating that the notice and consent requirements do not apply to investigations into misconduct or wrongdoing. Thus the law can now be read broadly to exempt any investigation by an outside entity into employee misconduct or wrongdoing from the notice and, more significantly, the consent requirements of the ICRA. C.C.§1786.16(a)(2). It should be noted that there is still some dispute regarding whether the notice and consent requirement under the FCRA applies to investigations into misconduct such as sexual harassment.

3. Employers are not required to provide employees suspected of misconduct with a copy of the investigation report.

One of the most serious consequences of last year's amendments emanated from the requirement that the applicant or employee receive a copy of any report prepared by a consumer reporting agency. Although there was a limited exception in the notice provision for misconduct investigations (see above), no such exception was included in the provision requiring the employer to provide a copy of the report to the accused person. Many employers feared that they would be unable to properly investigate claims of sexual harassment and other wrongdoing if the witnesses learned that the alleged wrongdoer would immediately receive a copy of the report.

To remedy this unintended consequence, the Legislature amended the ICRA to state that no copy of the report is required "if a report is sought for employment purposes due to suspicion held by an employer of wrongdoing or misconduct by the subject of the investigation." CC §1786.16(c).

4. Consumers must affirmatively request a copy of the report, which can be sent directly by the consumer reporting agency.

Last year's amendments placed the burden on the employer to promptly provide the subject of the report with a copy. This burden has been somewhat reduced. Now the employer must provide a "check box" which permits the consumer to indicate affirmatively that he or she wants to receive a copy of any report obtained by the employer. This check box can be included on the disclosure and consent form, or as a separate document. More importantly, the Legislature has clarified that this duty is delegable. It is advisable for an employer to agree with its consumer reporting agency that the consumer reporting agency will send a copy of the report directly to any consumer indicating a desire to receive the report at the same time that the report is sent to the employer. CC §1786.16(b).

5. An employer does not have to disclose in-house investigations or reference checks unless it obtains certain public records.

Among the most serious and controversial ramifications of last year's amendments was the provision that required all employers to disclose to applicants and employees the result of in-house investigations. As written, this would have included reference checks, as well as investigations into wrongdoing such as sexual harassment, discrimination or theft. This section has been almost completely rewritten.

Now the law states that an employer only has an obligation to disclose information obtained directly by the employer "that is a matter of public record." Public records are defined as "records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment." Where an employer receives such information, it must provide the consumer with a copy within seven days. Further, the consumer can waive their right to receive these reports by a "check box" on the job application or any other written form. However, even where the consumer has waived his or her right to receive this information, it must be provided if the employer takes adverse action based upon the information obtained from these public records. CC §1786.53.

In addition, a new section was specifically added indicating that the ICRA does not alter the ability of employers to exclude reference information from personnel files, as provided by California Labor Code §1198.5, and that the ICRA is not intended to force the disclosure of information protected by the attorney-client privilege and attorney work-product doctrine. CC §1786.55.

6. The provision requiring notice of adverse action is reinstated.

Last year's amendments deleted the provision of the ICRA requiring notice to a consumer where the employer decides to take adverse action based upon the contents of the report. The Legislature has reinstated this requirement, which is similar to a requirement that remains in the FCRA. Where an employer denies employment "either wholly or partly because of information contained in an investigative consumer report" the employer must notify the consumer of that fact along with the name and address of the consumer reporting agency. Under the FCRA, where adverse action is taken based upon the contents of a consumer report, a copy of the report must also be provided with this notice.

These Amendments Will Take Effect Immediately Upon Enactment
AB 1068 was signed into law on September 28, 2002. Recognizing the significant problems and potential liability that would face California's employers if the law were not changed, the Legislature has passed these amendments as a "clarification" of existing law and on an urgent basis. As a result, the amendments became effective immediately upon enactment. Further, because these changes are meant to be a "clarification" of existing law, they arguably eliminate liability for failure to comply with last year's amendments to the extent that those obligations have been deleted by the current amendments. On the other hand, employers must immediately comply with the newly enacted notice and consent provisions of the ICRA.

**Summary**

- California employers must provide notice and obtain consent every time they hire a consumer reporting agency to conduct a background check, except for investigations into suspected misconduct or wrongdoing.

- On the consent form, employers must provide a means for the consumer to obtain a copy of the report, and should decide in advance who will provide the report to the consumer.
- Employers do not have to provide a copy of the report regarding investigations into suspected misconduct or wrongdoing.
- Employers must notify the consumer if adverse action is taken based upon the contents of the background check, and may have to provide a copy of the report.
- Employers must provide consumers with public records reports obtained directly by the employer, unless the consumer waives this right.
- Employers do not have to provide information regarding background checks, reference checks or investigations conducted in-house other than these enumerated public records.

Robert Blumberg is a shareholder in Littler Mendelson's Los Angeles office and Rod Fliegel is a shareholder in Littler Mendelson's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Blumberg at RBlumberg@littler.com, or Mr. Fliegel at RFliegel@littler.com

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<< **News Room**

# Exhibit B

SB 1454
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# Heim, Noack, Kelly & Spahnn

GOVERNMENTAL RELATIONS


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ssell W. Noack
Anne Kelly
Leslie S. Spahnn
John Caldwell


**HAND DELIVERY**

September 3, 1998

The Honorable Pete Wilson
Governor, State of California
State Capitol, First Floor
Sacramento, CA 95814

**Re: Senate Bill 1454 (Leslie) – REQUEST FOR VETO**

Dear Governor Wilson:

On behalf of our client, ChoicePoint, we urge you to veto Senate Bill 1454.

While SB 1454 is well-intentioned, it contains a technical error that will make it difficult for employers to obtain information about prospective employees. For example, it will make it harder for delivery services to find out if an applicant has a DUI, or for child care providers to find out about the background of individuals who will be working with children. If enacted, California would be unique -- no other state places such limitations on employers.

First, ChoicePoint, the nation's largest provider of pre-employment background checks, apologizes for their late opposition to this bill. An Atlanta based firm, they were not made aware of this bill until, literally, the last day of the Session. They had no representation in Sacramento at the time and, thus, were unaware of the problem and unable to get their story out. The result is that they now have no alternative but to raise the issues at the last minute with you.

**Consumer Reports vs. Investigative Consumer Reports.** The problem with this bill is that it confuses two types of reports. Under the Fair Credit Reporting Act (FCRA), employers can use a company like ChoicePoint to obtain such background information on applicants as their criminal history, driving record or previous employment history. These are defined by the FCRA as "consumer reports," and they have traditionally consisted of public record information. The FCRA places requirements on the users to protect the individual against inaccurate or fraudulent information.


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In addition to "consumer reports," FCRA also regulates "investigative consumer reports" – which is the subject of SB 1454. "Investigative consumer reports" are, by federal definition, reports that are obtained through personal interviews with acquaintances, neighbors and friends. Because of the more personal nature of information contained in these "investigative consumer reports," Congress enacted more restrictive burdens on their use. ChoicePoint, an FCRA compliant company, strongly adheres to these requirements and provides training for employers and seminars for their customers to ensure compliance.

**Eliminates Distinction.** The distinction between "investigative consumer reports" and "consumer reports" is significant – distinctions that are recognized by the FCRA. However, this bill eliminates the distinction between the two, effectively subjecting "consumer reports" – that are based on public information – to the same rules placed on private information collected through personal interviews.

SB 1454 eliminates the distinction by changing the definition of "investigative consumer reports." Civil Code Section 1786.2 (c) presently defines "investigative consumer reports" as reports that contain information that 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." That language in California law is identical to the language used in the FCRA. SB 1454 deletes that language and instead defines "investigative consumer reports" to mean reports that include information obtained "by any means." This simple change means that, as a practical matter, there is no distinction between the two reports.

**Conforms To Federal Law?** According to the Senate Judiciary Committee analysis, the bill has "been drafted to mirror federal language." In fact, federal law clearly defines "consumer reports" and "investigative consumer reports." SB 1454 eliminates that distinction by striking language directly from FCRA! In short, SB 1454 does not conform to federal law.

**Bad For Employers.** If enacted, employers using "consumer reports" would face new and onerous requirements. Today, for example, some food delivery companies use ChoicePoint when hiring drivers. Obviously, these prospective employers do not want accident-prone drivers on their payrolls. Typically, these reports are only generated for prospective drivers who do not meet the driving profile requested by the food delivery service. Also, under state law TODAY, if any person is rejected because of one of these reports, that person can see the report and request that changes be made to it if there is an error.

However, under SB 1454, that same employer will be required to provide every applicant with a copy of the "consumer report" – even though, the employer never gets an actual report in most cases. The result will be that employers will have to pay for reports he or she is not paying for today. And for what reason? It makes good sense that a rejected applicant have the ability to see why he or she was rejected; but what purpose is served by forcing the employer to give a report to somebody when the report shows that there is not a problem?

This and other increased requirements will only discourage employers from effectively using background checks on prospective employees. Ironically, the analysis by the Senate Judiciary Committee states that it is the author's intent to increase "the number of employers using background checks on applicants as a way of minimizing potential legal and financial exposure."

The need for more information by California's small business owners is real. SB 1454 threatens to remove this information from an employer's decision making arsenal.

**Existing Law Provides Significant Protections For Consumers.** Under Civil Code Section 1785.20, if an individual is turned down for a job because of the results of a "consumer report," then the employer must provide all of the following to the rejected applicant: 1) a written notice that the decision was based in part on the consumer report; 2) the name, address, and telephone number of the consumer reporting agency which furnished the report; and, 3) a written notice of the applicant's rights, including the right to obtain a free copy of the consumer's report from the consumer reporting agency, and the right of the individual to dispute the accuracy or completeness of any information in the consumer report.

(Section 1785.20 applies to "adverse actions" taken by "consumer credit reporting agencies," and thus appears not to apply to employment. However, Civil Code Section 1785.3 defines "consumer credit report" as a report that is used for, among other things, "employment purposes." In addition, Section 1785.3 also defines "adverse action" to include "denial of employment." In other words, Section 1785.20 clearly applies to employment and rental related "consumer reports.")

**SB 1454 Bad For Consumers.** The protections in the current law outlined above, only apply to reports produced by a third party. Thus today, if a person is rejected for a job because of something on one of these "consumer reports," he or she can see the report and have it corrected. Unfortunately, if SB 1454 becomes law, many businesses will stop using the reports – either because of increased costs or the

increased regulation. In some cases, the employers may investigate the applicants themselves. In those cases, applicants turned down for employment would not have the ability to find out why they were rejected or to discover and correct mistakes on files.

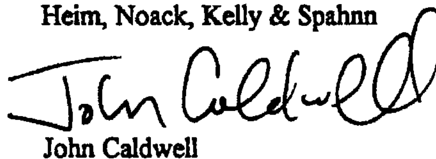
**Conclusion.** All the above-referenced problems stem from one simple mistake in the bill – it treats two separate, legally different reports the same. It is not known if this mistake was intentional, although none of the analyses of the bill make any mention of the distinction between "consumer reports" and "investigative consumer reports." In any event, this relatively minor mistake will result in significant problems for any employer who uses these reports – including those in child care and home health care. The fact is, consumers already have significant protections for both reports. SB 1454 will not provide any new protections for consumers and it will hurt business.

ChoicePoint supports efforts to mirror federal law in this area. However, the technical error in this bill is significantly out of step with current law. Should you veto this bill, ChoicePoint would welcome the chance to work with the Legislature to fix this error and enact consumer protections that are consistent with the FCRA.

For the reasons above, we urge you to return SB 1454 without your signature.

Sincerely,

Heim, Noack, Kelly & Spahnn



John Caldwell

JC/kmg

cc: The Honorable Tim Leslie
Happy Chastain, State and Consumer Services Agency

# Exhibit C

# Heim, Noack, Kelly & Spahnn
GOVERNMENTAL RELATIONS

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.ussell W. Noack
Anne Kelly
Leslie S. Spahnn
John Caldwell

September 11, 1998

The Honorable Pete Wilson
Governor, State of California
First Floor, State Capitol
Sacramento, CA 95814

Re: Senate Bill 1454 (Leslie)

Dear Governor Wilson:

On behalf of our client, ChoicePoint, we'd like to make a brief reply to Senator Leslie's letter of September 8.

It is not, nor has it ever been, ChoicePoint's intention to render California's Fair Credit Reporting Act (FCRA) meaningless. But rather our concerns arise because SB 1454 will end significant distinctions between an "investigative consumer report" and a regular "consumer report" that is recognized in current California (Civil Code §1786.2(c)) and federal (FCRA §603(e)) laws [see attachments]. These distinctions are important and are worthy of being maintained because employers who base their hiring decisions on public record information only, as opposed to personal interviews with an applicant's friends, will be subjected to greater paperwork and greater costs.

We believe that by raising the issue of a conflict between §1787.2 and §1786.18, SB 1454 purports to fix a problem that does not exist. Under current law, consumer reporting agencies are not allowed to include the obsolete information described in §1786.18 regardless of how they become aware of that information. Whether learned by a bankruptcy filing in the county courthouse or through an interview with a next door neighbor, consumer reporting agencies are not permitted to report bankruptcies older than 10 years (FCRA §605(a)(1)). (While the current 1786.18 allows consumer reporting agencies to go back 14 years, we do not oppose SB 1454's efforts to make this section conform to federal law.) Thus the definition of an "investigative consumer report" has nothing to do with this prohibition. By making a change in the definition to fix this perceived problem, SB 1454 will cause consequences that are unintended.

Regarding Senator Leslie's second concern, while there is no requirement that employers provide a free copy of the investigative consumer report, there is a requirement that employers provide additional notices to the individual that are not required by current state

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SEP 11 1998

and federal law. This should have been our original statement and we apologize for any misunderstanding caused by our previous letter.

Under current law employers are required to provide additional notifications to applicants when an investigative consumer report is going to be used to determine their employment eligibility. ChoicePoint heartily supports providing this notice to consumers when personal interviews are conducted to prepare a report. However, this legislation would require employers who use only public record information, (i.e., driver's record or criminal history report), to provide an applicant with these additional notifications. This significantly expands the current California and federal Fair Credit Reporting Acts. ChoicePoint believes it is an unnecessary burden to require businesses to provide this additional paperwork to applicants when their driving history alone is used.

Again, we appreciate the opportunity to respond to Senator Leslie's concern. As a company that serves many business customers in California, ChoicePoint respects Senator Leslie's efforts on behalf of the state's business community. We, however, believe that this bill, as currently drafted, has unintended consequences, and we reiterate our desire to work with soon-to-be Lt. Governor Leslie during the next legislative session to enact fair consumer protections that mirror federal statutes.

Thank you for your attention to our remarks.

Sincerely,

HEIM, NOACK, KELLY & SPAHNN

John Caldwell

cc: Dietmar Grellman
Senator Tim Leslie

## PROOF OF SERVICE

I, Craig Davis, counsel for *amici curiae*, hereby declare:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 1714 Stockton Street, Third Floor, Suite 305, San Francisco, CA 94133.

On the date set forth below, I caused a copy of the following documents to be served:

**APPLICATION TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* A NEW WAY OF LIFE REENTRY PROJECT, BAY AREA LEGAL AID, BET TZEDEK LEGAL SERVICES, CENTER FOR EMPLOYMENT OPPORTUNITIES, COLLATERAL CONSEQUENCES RESOURCE CENTER, COMMUNITY SERVICE SOCIETY OF NEW YORK, DRUG POLICY ALLIANCE, EAST BAY COMMUNITY LAW CENTER, ELLA BAKER CENTER FOR HUMAN RIGHTS, EQUAL RIGHTS ADVOCATES, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, LEGAL ACTION CENTER, LEGAL AID FOUNDATION OF LOS ANGELES, LEGAL AID OF MARIN, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, LEGAL SERVICES OF NORTHERN CALIFORNIA, NATIONAL CONSUMER LAW CENTER, NEIGHBORHOOD LEGAL SERVICES OF LOS ANGELES COUNTY, NORTH CAROLINA JUSTICE CENTER, PUBLIC COUNSEL, PUBLIC INTEREST LAW PROJECT, PUBLIC LAW CENTER, ROOT & REBOUND, RUBICON PROGRAMS, WESTERN CENTER ON LAW AND POVERTY *IN SUPPORT OF PLAINTIFF-APPELLANT***

On April 27, 2016, I placed a true copy of the document described above, enclosed in a sealed envelope, in a designated area for outgoing mail, addressed as set forth below:

Ronald Peters
Defendants-Respondents: First Student, Inc., and First Transit, Inc.
Littler Mendelson, P.C.
50 W. San Fernando, 15th Floor,
San Jose, CA 95113

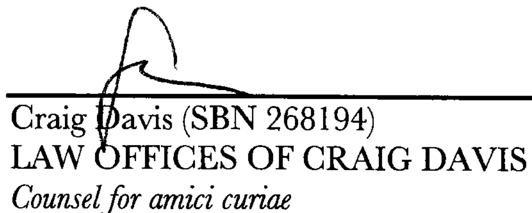
Rod Fliegel
Defendants-Respondants HireRight Solutions, Inc. and Hire Right, Inc.
Littler Mendelson, P.C.
650 California Street, 20th Floor
San Francisco, CA 94108

Catha Worthman; Todd Jackson
Plaintiffs-Appellants Eileen Connor & Jose Gonzales
Feinberg, Jackson, Worthman & Wasow, LLP
383 4th Street, #201
Oakland, CA 94607

Michele Van Gelderen, Appellate Coordinator,
California Department of Justice,
300 S. Spring St., Los Angeles, CA (90013-1230)

Clerk of the Los Angeles Superior Court
600 Commonwealth Ave.
Los Angeles, CA 90005
Clerk, Court of Appeals, Second District,
Division Four 300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Craig Davis (SBN 268194)
LAW OFFICES OF CRAIG DAVIS
*Counsel for amici curiae*