No. S229428

IN THE
SUPREME COURT OF CALIFORNIA

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

Court of Appeal, Second Appellate District, Case Nos. B256075, B256077
Los Angeles County Superior Court, Case No. JCCP 4624
(In re First Student, Inc. Cases)
The Honorable John S. Wiley

APPLICATION TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CALIFORNIA REINVESTMENT COALITION, CONSUMER ACTION, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, HOUSING AND ECONOMIC RIGHTS ADVOCATES, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL HOUSING LAW PROJECT AND PUBLIC GOOD LAW CENTER *IN SUPPORT OF PLAINTIFF-APPELLANT*

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

SETH E. MERMIN (SBN 189194)
THOMAS BENNIGSON (SBN 237804)
JONATHAN S.M. FRANCIS (SBN 307722)
PUBLIC GOOD LAW CENTER
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 393-8254
TMermin@publicgoodlaw.org

Counsel for *Amici Curiae*

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PUBLIC GOOD LAW CENTER
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 393-8254
TMermin@publicgoodlaw.org

Counsel for *Amici Curiae*

APPLICATION TO FILE *AMICUS* BRIEF

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

This application is timely made, per Rule 8.520(f) 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 person or entity made a monetary contribution intended to fund the preparation or submission of the brief other than the *amici curiae*, their members, or their counsel in the pending appeal.

I. INTEREST OF *AMICI CURIAE*

The proposed *amici curiae* – California Reinvestment Coalition, Consumer Action, Consumers for Auto Reliability and Safety, Housing and Economic Rights Advocates, National Association of Consumer Advocates, National Employment Law Project, National Housing Law Project and Public Good Law Center – constitute a diverse group of public interest organizations dedicated to protecting and vindicating the rights of Californians in fields of law ranging from automobile sales to housing, from employment to consumer finance. As detailed in the Statement of Interest of Amici Curiae in the accompanying brief, the proposed *amici* represent a great breadth of

experience and variety of expertise across a range of subject matter areas. What the proposed *amici* all share, however, is a commitment to certain ideas: (1) that California needs a robust consumer reporting regime and (2) that the reasoning in *Ortiz v. Lyon Mgmt. Grp., Inc.* (2007) 157 Cal.App.4th 604 not only threatens that regime but would also, if extended, wreak havoc in fields across the spectrum of law. If statutes *in pari materia* are unconstitutionally vague simply because they apply to the same conduct, then vast numbers of laws in the areas in which the proposed *amici* practice will effectively be rendered void.

II. NEED FOR FURTHER BRIEFING

The proposed *amici curiae* believe that further briefing is necessary to explore matters not fully addressed by the parties' briefs, particularly the breadth of the impact that First Student's interpretation of the void-for-vagueness doctrine could have on laws beyond the area of consumer reporting. There is nothing inherent in the *Ortiz* court's reading of the 14th Amendment's due process clause that would limit the decision's effect to consumer reporting. To the contrary, if a person has a constitutional right to be subject to no more than one law at a time on a given subject, or if compliance with one of two overlapping laws renders the other law void, then virtually every field of law would be disrupted: criminal law, intellectual property, antitrust, consumer law, environmental law, civil rights, and commercial law, to name but a few. The list of affected areas is long indeed.

The proposed *amici* believe that in determining whether to adopt the reasoning of *Ortiz*, this Court would benefit from a full explication of the potential consequences of its decision, and that providing this context may add substantially to the Court's analysis.

III. CONCLUSION

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

Dated: April 27, 2016

Respectfully submitted,

By: _____

SETH E. MERMIN, SBN 189194
THOMAS BENNIGSON, SBN 237804
JONATHAN S.M. FRANCIS SBN 307722
PUBLIC GOOD LAW CENTER
3130 Shattuck Ave.
Berkeley, CA 94705
Telephone: (510) 393-8254
TMermin@publicgoodlaw.org

Counsel for amici curiae

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JONATHAN S.M. FRANCIS (SBN 307722)
PUBLIC GOOD LAW CENTER
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 393-8254
TMermin@publicgoodlaw.org

Counsel for *Amici Curiae*

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INTRODUCTION AND SUMMARY OF ARGUMENT

Operating side by side, California's two principal laws governing consumer reports provide critical dual protection to consumers of this state. Together, the Investigative Consumer Reporting Agencies Act (ICRAA) and the Consumer Credit Reporting Agencies Act (CCRAA) form a unified shield against abuses by the consumer reporting industry.

The legislature's decision to enact a multi-layer statutory scheme merits considerable deference. Invalidation of overlapping laws is proper only where the laws irreconcilably conflict – a high bar that Defendants-Respondents First Student, Inc., et al (collectively First Student) have not met and cannot meet here. Particularly because the ICRAA and the CCRAA share the same legislative purpose of ensuring fairness in the use of consumer reports, this Court can easily reconcile and give full effect to both statutes. Longstanding precedent of this Court and the United States Supreme Court demands no less.

In a wide variety of contexts stretching from employment law to consumer law to environmental law to antitrust law to banking law – indeed, to just about any area of regulated conduct – courts have readily handled overlapping laws without declaring one or more of those statutes unconstitutionally vague. Faced with complex and intersecting legal schemes, courts have regularly and repeatedly rejected constitutional challenges and instead worked to harmonize laws with overlapping coverage. In doing so, courts have carefully avoided, whenever possible, a statutory interpretation that deprives any statute of full force. A decision upholding the ICRAA and the CCRAA follows directly from

this long line of cases. Such a decision is all the more appropriate given this Court's mandate that "a remedial statute's protective purpose is to be construed liberally on behalf of the class of persons it is designed to protect." (*Pineda v. Williams–Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530.)

Ignoring overwhelming precedent, First Student urges this Court to affirm the superior court's decision striking down the ICRAA as unconstitutionally vague for overlapping with the CCRAA. This distortion of the void-for-vagueness doctrine into a "void for overlap" or "one law at a time" principle stems from a single judicial decision, *Ortiz v. Lyon Mgmt. Grp., Inc.* (2007) 157 Cal.App.4th 604, and stretches the traditional bounds of the vagueness doctrine beyond recognition. Where, as here, two statutes are well defined and give clear notice of the conduct they require, their overlap alone cannot justify a finding of unconstitutionality. Broad application of such a "void for overlap" approach would call into question the validity of statutory schemes in nearly every field of law.

Adoption of First Student's proposed approach would eviscerate California's consumer reporting regime and could lead to widespread, unnecessary disruption of volumes of long-settled law. There is no reason to take that path. *Amici* ask that this Court confirm well-established principles of statutory interpretation, affirm the judgment of the Court of Appeal, and uphold the ICRAA.

INTEREST OF *AMICI CURIAE*

Amici curiae constitute a diverse group of public interest organizations dedicated to protecting and vindicating the rights of Californians in fields of law ranging from automobile sales to housing, from employment to consumer finance.

California Reinvestment Coalition (CRC) has been advocating for fair and equal access to credit for all California communities since 1986. Over the past 30 years, CRC has grown into the largest state community reinvestment coalition in the country, with a current membership of 300 nonprofit organizations working for the economic vitality of low-income communities and communities of color. Among CRC's members are a diverse set of organizations including nonprofit housing counselors, consumer advocates, community organizers, legal service providers, affordable housing developers, small business technical assistance providers, and more. The people served by CRC's members need the protections of California's consumer reporting laws. They also need crucial laws addressing discrimination in housing, lending and other vital activities that would be endangered by a legal doctrine that strikes laws down simply because they overlap in what they cover.

Consumer Action is a non-profit, membership-based organization committed to consumer education and advocacy in California. During its more than three decades, Consumer Action has become renowned for its multilingual consumer education and advocacy in the fields of consumer protection, credit, banking, privacy, insurance and utilities. In all of these fields, overlapping laws provide crucial protections to California residents.

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has spearheaded enactment of numerous landmark laws to improve protections for the car-buying public, which have been signed into law by governors from both major parties, and has successfully petitioned the National Highway Traffic Safety Administration for promulgation of federal motor vehicle safety regulations. CARS has been a leading proponent of full disclosure of important and relevant information to consumers, including sponsoring first-in-the-nation legislation enacted in California to prohibit the imposition of secrecy in settlements with manufacturers who repurchase seriously defective "lemon" vehicles. If laws which happen to overlap in their coverage are held to be unconstitutionally vague, protections for California car buyers will be severely damaged.

Housing and Economic Rights Advocates (HERA) is the only California statewide, not-for-profit legal service and advocacy organization with the mission of ensuring that all people are protected from discrimination and economic abuses, especially in the realm of housing. HERA's work includes providing direct legal services on all forms of credit reporting problems. HERA promotes affordable and fair credit access, asset building and preservation. HERA fights abusive mortgage servicing, problems with homeowner associations, foreclosure, escrow and other homeowner problems, and predatory lending of all kinds. All of HERA's work requires a robust system of interlocking laws that together serve to protect all Californians.

National Association of Consumer Advocates (NACA) is a nationwide non-profit corporation whose over 1,000 members are private, public sector, legal services and non-profit lawyers, law professors, and law students whose primary practices or interests involve consumer rights and protection. NACA is dedicated to furthering the effective and ethical representation of consumers and to serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. NACA has furthered this interest in part by appearing as *amicus curiae* in support of consumer interests in federal and state courts throughout the United States. NACA has appeared as *amicus* in support of consumer interests in many California cases including, among others in this Court, *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (2011) and *Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006).

The **National Employment Law Project (NELP)** is a non-profit law and policy organization with more than 45 years of experience advocating for the employment rights of the nation's workers, including supporting laws and policies that reduce barriers to employment for people with arrest and conviction records. ICRAA provides important protections for consumers, including applicants with criminal records trying to reenter their communities by securing stable employment. Relevant to this matter, NELP has an interest in upholding the validity of California's consumer reporting regime and other vital employment-related laws that overlap in the support and protections they provide.

National Housing Law Project (NHLP) is a charitable nonprofit corporation established in 1968 whose mission is to use the law to advance housing justice for the

poor by increasing and preserving the supply of decent, affordable housing; by improving existing housing conditions, including physical conditions and management practices; by expanding and enforcing tenants' and homeowners' rights; and by increasing housing opportunities for people protected by fair housing laws. NHLP recognizes the importance of preserving laws – including overlapping laws – that provide crucial protections to people seeking to find and maintain housing.

Public Good Law Center is a public interest organization dedicated to the proposition that all are equal before the law. Through participation in cases of particular significance for consumer protection, free speech and civil rights, Public Good seeks to ensure that the protections of the law remain available to everyone. The ICRAA and CCRAA represent a careful legislative balance between the need for information by users of consumer reports and the need for privacy and accuracy by the subjects of those reports. To upset that balance simply because statutes may have areas of overlap would unsettle the expectations of each organization and individual in California whose work touches on the law – that is, just about everybody.

Amici curiae submit this brief for two reasons: (1) to help preserve California's longstanding and vital statutory regime regulating consumer reporting, and (2) to convey the urgency of rejecting an interpretation of the Due Process Clause that could decimate established regulatory structures in virtually every substantive area of California law.

ARGUMENT

Since their joint enactment in 1975, the ICRAA (Cal. Civ. Code, §§ 1786-1786.2) and the CCRAA (Cal. Civ. Code, §§ 1785.1-1785.6) have operated in harmony to thwart harmful practices in the consumer reporting industry. There is no reason that they cannot continue to do so.

The history of the statutes' development makes clear their shared purpose and complementary (though overlapping) scope. When originally enacted, the ICRAA was limited to information "obtained through personal interviews." Although both laws contained strong protections, by 1998 the legislature had become troubled by the employment and tenant screening industries' "broad use of database information, such as DMV records, civil judgments, bankruptcies, criminal records, etc.," which did not exist when the ICRAA and the CCRAA were enacted in the 1970s. (Plaintiff-Appellant's Request for Judicial Notice (RJN), Exh. B at pp. 3-4.) To reflect these changes in the industry, the legislature removed the personal interviews limitation and expanded the reach of the ICRAA, which contained stricter requirements and higher penalties than the CCRAA. (Cal. Civ. Code, § 1786.2(c).) The legislature hoped this expansion would give "fewer employment background search organizations" the "opportunity to make bogus or inaccurate data available on an individual." (RJN, Exh. F.)

As a result of the 1998 amendments, the overlap between the ICRAA and the CCRAA increased substantially, though certain reports are still only subject to one or the other. That consumers may have dual protection provides no cause for confusion to businesses, however, since compliance with the ICRAA's more stringent requirements

will also satisfy the CCRAA. And because the ICRAA and the CCRAA do not conflict at all – much less irreconcilably – they must be harmonized. (*Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.)

Defendants-Respondents First Student, Inc. and First Transit, Inc. (collectively "First Student") nevertheless assert that the overlap between the ICRAA and the CCRAA creates confusion that renders the ICRAA constitutionally invalid. (*See* Defendants-Respondents' Brief [Resps.' Br.] at p. 3.) That assertion – indeed, the void-for-vagueness doctrine as a whole – has no place here, since both the ICRAA and the CCRAA clearly define the conduct each requires. Moreover, First Student's expansive and novel version of the void-for-vagueness doctrine contrasts starkly with a myriad of federal and California cases analyzing overlapping laws. A doctrine that invalidates laws simply because they overlap makes no sense when complex, multi-layer statutory schemes pervade nearly every field of law. The approach advanced by First Student is unworkable and at odds with longstanding precedent. It should be rejected.

I. THE DOCTRINE OF IMPLIED REPEAL OFFERS THE PROPER FRAMEWORK FOR ANALYZING OVERLAPPING STATUTES AND CONCLUSIVE SUPPORT FOR THE ICRAA AND THE CCRAA.

The doctrine of implied repeal, not void-for-vagueness, is the correct lens for analyzing the overlap between the ICRAA and the CCRAA. The doctrine of implied repeal requires that a court if possible harmonize "two acts upon the same subject," not discard one or the other of them. (*United States v. Borden Co.* (1939) 308 U.S. 188, 198.) Courts must "give effect to both [laws] if possible"; only if two laws are irreconcilable may a court find that one has been repealed by implication. (*Ibid.*) Here,

the Court can easily harmonize the ICRAA and the CCRAA, and "construe them to give force and effect to all of their provisions." (*Pac. Palisades*, *supra*, 55 Cal.4th at p. 805.) Specifically, the Court, in deference to the legislature, may readily apply the ICRAA's "higher requirement[s] as satisfying both" the ICRAA and the CCRAA. (*Powell v. U.S. Cartridge Co.* (1950) 339 U.S. 497, 518-19.)

Neither the ICRAA nor the CCRAA contains an "express declaration of legislative intent" to repeal the other. (*Pac. Palisades*, *supra*, 55 Cal.4th at p. 805.) Where no such declaration exists, a finding of implied repeal is proper "only when there is no rational basis for harmonizing two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Ibid.*) This is far from the case here. As the Court of Appeal found, "There is nothing in either the ICRAA or the CCRAA that precludes application of *both* acts to information that relates to both character and creditworthiness." (239 Cal.App.4th at pp. 530-551 [emphasis in original]).

Courts have repeatedly upheld overlapping statutes, especially where, as here, the same legislative purpose underlies both laws. In the context of a newly enacted Labor Code provision governing workers' compensation, for example, this Court rejected the employer's argument that the new provision limited an employee's relief under pre-existing Labor Code protections: The "legislative purpose underlying the [new] legislation was to provide additional protection for vulnerable employees; the enactment was not intended to relieve uninsured employers of obligations existing under prior law." (*Flores v. Workmen's Comp. Ap. Bd.* (1974) 11 Cal.3d 171, 176.) Similarly, the

legislature intended the 1998 amendments to the ICRAA to broaden protections for consumers. (RJN, Exh. F) In light of this purpose, it makes no sense to read the amendment, as First Student urges, to strip away the protections that the ICRAA provides. Such a holding would directly contradict the intent of the legislature.

Given that the same legislative purpose – protecting consumers – underlies the ICRAA and the CCRAA, it comes as no surprise that the two statutes may easily be harmonized. Indeed, the introductory language in the statutes is nearly identical, each describing the "need to insure that [] consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." (Compare Cal. Civ. Code, § 1785.1 with *id.* at § 1786.) A long line of cases directs that statutes with a shared purpose be construed as "mutually supplementary" rather than "mutually exclusive," unless it is impossible to do so. (E.g., *Powell v. U.S. Cartridge Co.* (1950) 339 U.S. 497, 518-519 [applying the "higher requirement [of two labor laws] as satisfying both"]; *Pac. Palisades*, *supra*, 55 Cal.4th 783 [requiring compliance with three overlapping coastal development laws].) Ample precedent belies First Student's suggestion that there is "no authority supporting [the] argument that an employer needs to comply with the ICRAA's more stringent requirements." (Resps.' Br. at p. 39.)

This Court's recent decision in *Pacific Palisades* exemplifies the rule of harmonization. (*Pac. Palisades*, *supra*, 55 Cal.4th at p. 793 [examining the "interplay among three separate statutory schemes," all "regulating development within California's coastal areas"].) The defendant, a mobile home developer, asserted that a new local law

prohibited the municipal government from enforcing compliance with two state laws. (*Id.* at p. 801.) The Court rejected that argument, emphasizing that the local law could reasonably be construed to require certain actions of the developer "*in addition* to the procedures and hearings required by other state laws." (*Id.* at p. 805 [emphasis in original].) The ICRAA likewise sets out protections for consumers "*in addition* to," not instead of, those contained in the CCRAA. And, here as in *Pacific Palisades*, "significant state policies favor an interpretation" of the overlapping statutes that "does not deprive" any law of its force. (*Id.* at p. 803.)

The conclusion that overlapping laws "do not pose an either-or proposition" follows from the reality that "[r]edundancies across statutes are not unusual events in drafting." (*Connecticut Nat'l Bank v. Germain* (1992) 503 U.S. 249, 253.) As the court of appeal noted, that the ICRAA and the CCRAA both apply to certain consumer reports is of no consequence so long as "there is no 'positive repugnancy' between" the two statutes. (*Ibid.*, quoted in *Connor*, 239 Cal.App.4th at p. 538.) Indeed, far from conflicting with one another, the ICRAA and the CCRAA provide much needed "dual protection" (*J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.* (2001) 534 U.S. 124, 144) to consumers facing a growing consumer reporting industry with ever increasing access to personal information.

The U.S. Supreme Court has repeatedly endorsed overlapping laws that create multiple layers of protection, assuming "each reaches some distinct cases." (*J.E.M. Ag Supply*, *supra*, 534 U.S. at p. 144.) This dual protection principle extends broadly across the spectrum of regulated activities. (See, e.g., *Mazer v. Stein* (1954) 347 U.S. 201, 217

[holding that patentability of an object does not preclude copyright of that object as a work of art]; *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 381 [harmonizing the Securities Act of 1933 and the Securities Exchange Act of 1934]; *Brown v. Superior Court* (1984) 37 Cal.3d 477, 486-87 [upholding overlapping employment laws]; *Natural Res. Def. Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 965 [harmonizing overlapping environmental laws].)

Practically, dual protection schemes often mean that a specific action is covered by two laws, one of which triggers stricter penalties. This does not mean, of course, that a court must "choose between giving effect" to one law and ignoring the other. (*Germain, supra*, 503 U.S. at p. 253.) Rather, the regulated party can simply "apply[] the higher requirement as satisfying both" laws. (*Powell, supra*, 339 U.S. at p. 528.) Here, if the creation of a consumer report triggers both the ICRAA and the CCRAA, then compliance with the ICRAA will also satisfy the CCRAA. There is no reason that the two statutes cannot "comfortably coexist." (*Things Remembered, Inc. v. Petrarca* (1995) 516 U.S. 124, 129.)

When the legislature wants to create mutually exclusive statutes, it knows how to do so. For example, in contrast with the situation here, the Commercial Credit Reporting Agencies Act, which covers reports "relating to the financial status or payment habits of a commercial enterprise," states explicitly that its terms do *not* apply to any report covered by the ICRAA or the CCRAA. (Cal. Civ. Code, § 1785.42 [a commercial credit report "does not include a report subject to Title 1.6 (commencing with Section 1785.1), Title 1.6A (commencing with Section 1786) . . . "].) In the absence of such express language,