

Supreme Court Case No.: S229428

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

After a Decision by the Court of Appeal, Second Appellate District

Case No. B256075

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

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TRANSIT, INC.

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I.

STATEMENT OF ISSUES PRESENTED FOR REVIEW.

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

II.

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

FACTUAL BACKGROUND

A. The Parties.

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

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

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

2. HireRight Solutions, Inc.

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

3. Respondent Eileen Connor.

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

B. FirstGroup PLC, Acquires Laidlaw International, Inc.

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

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

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

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

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

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

D. The Background Checks At Issue In This Action.

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

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

- The USIS Widescreen Report. HireRight Solutions prepares this report by reviewing a proprietary database it maintains that compiles information from prior criminal record checks for the subject of the background check to identify counties to be searched. It then searches specific public records on the individual in those counties.
- County Criminal Record Report. The county criminal records search is conducted by reviewing the publically available records in the criminal courthouses in the specific counties searched.
- Sex Offender Report. The sex offender report is prepared by searching available sex offender registries nationwide.

- Address History Report. The address history report is prepared by reviewing electronic databases to identify which counties the individual lived based on his or her Social Security number. Like the Widescreen Report, this report is prepared to identify in which counties the county criminal record searches should be conducted.
- The MVR Report. The MVR driver's license check is conducted by submitting a request to the state for a copy of the subject's driving records.
- Social Security Number Check. The Social Security number check is conducted by comparing the individual's social security number to a table provided by the Social Security Administration that tells, based on a number range, the location where the number was issued and whether the individual with that number has been reported as deceased.
- Employment Verification Report. The employment verification report is, at times, prepared by contacting a database provider and, at other times, prepared by contacting the individual's former employers, which are identified by the employee in his/her employment application. It is prepared to confirm the information the individual provided on his/her employment application.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cal. Civ. Code § 1785.3(c).

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

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

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

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

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

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

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

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