Case No.: S229428

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EILEEN CONNOR,

Plaintiff and Appellant,

v.

FIRST STUDENT, INC., et al.,

Defendants and Respondents

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

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

ANSWER BRIEF ON THE MERITS OF PLAINTIFF AND APPELLANT EILEEN CONNOR

HUNTER PYLE, SBN 191125
TANYA TAMBLING, SBN 262979
RACHEL EVANS, SBN 291876
SUNDEEN SALINAS & PYLE
428 13th Street, 8th Floor
Oakland, CA 94612
Telephone: (510) 663-9240; Facsimile: (510) 663-9241
hpyle@ssrplaw.com, ttambling@ssrplaw.com, revans@ssrplaw.com

TODD F. JACKSON, SBN 202598
CATHA WORTHMAN, SBN 230399
FEINBERG, JACKSON, WORTHMAN & WASOW LLP
383 4th Street, Suite 201
Oakland, CA 94607
Telephone: (510) 269-7998; Facsimile: (510) 839-7839
todd@feinbergjackson.com, catha@feinbergjackson.com

Attorneys for Plaintiff and Appellant Eileen Connor

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Oakland, CA 94607
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todd@feinbergjackson.com, catha@feinbergjackson.com

Attorneys for Plaintiff and Appellant Eileen Connor

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QUESTION PRESENTED

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

INTRODUCTION AND STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARDS OF REVIEW

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

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

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

BACKGROUND

I. Relevant Factual Background

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

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

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

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

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

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

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

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

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

II. Statutory Background: ICRAA and CCRAA

A. The Scope of ICRAA and CCRAA.

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

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

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

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

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

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

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

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

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

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

B. ICRAA's Expansion Under the 1998 Amendments.

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

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

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

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

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

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

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

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

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

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

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

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

III. Los Angeles Superior Court Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Appellate Court Proceedings

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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