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S229428

**IN THE
SUPREME COURT OF CALIFORNIA**

CONNOR

Plaintiff-Appellant,

v.

FIRST STUDENT, INC., ET AL.,

Defendants-Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,
DIVISION FOUR, CASE NO. B256075

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE THE CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF FIRST STUDENT, INC., ET AL.

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April 27, 2016

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE THE CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF FIRST STUDENT, INC., ET AL.

Pursuant to Rule 8.520(f) of the California Rules of Court, the Consumer Data Industry Association ("CDIA"), an international trade association supporting companies offering consumer reporting services, respectfully applies for leave to file the accompanying amicus curiae brief in support of First Student, Inc., et al. The CDIA is familiar with the contents of the parties' briefs.

The CDIA was founded in 1906, and is headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer credit reporting agencies and investigative consumer reporting agencies (collectively, "CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world, with a membership of approximately 180 consumer credit and other specialized CRAs operating throughout the United States and the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., in 1970, its subsequent amendments, and every rulemaking conducted under the

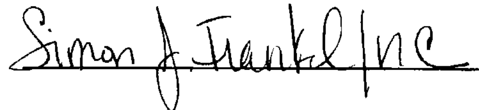
FCRA. The California credit reporting laws, enacted in 1975, are modeled on this federal precedent.

CDIA has a significant interest in this case because its members face an onslaught of class action litigation under the Investigative Consumer Reporting Agencies Act ("ICRAA") (Cal. Civil Code §1786 et seq.) and the California Credit Reporting Agencies Act ("CCRAA") (Cal . Civil Code § 1785.1 et seq.). CRAs perform the economically vital function of gathering large amounts of consumer information and making that information available for use in credit, insurance, employment, apartment rental and other important decisions. CRAs operate in a heavily regulated environment, touch on the vast majority of adult Americans, and handle billions of discrete pieces of data. As a result, CRAs frequently find themselves subject to class actions. Many of the cases that are brought against CRAs are based on alleged violations that are technical at best, but because the potential liabilities are so enormous, responsible companies may feel obligated to settle to avoid the risk, however remote, of an unfavorable judgment.

CDIA believes its views will assist the Court in resolving this case by providing a unique perspective on definitional issues and practical implications that will aid the Court in its decision.

Respectfully submitted,

April 27, 2016



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BRIEF OF AMICUS CURIAE THE CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF FIRST STUDENT INC., ET AL.

INTRODUCTION

The members of the Consumer Data Industry Association ("CDIA") are consumer reporting agencies ("CRAs") subject to state and federal laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. CDIA's members share a deep concern for clarity of these regulations because the regulations establish the legal obligations of CRAs and employers and provide consumers with important rights.

In the present case, the Court of Appeal ignored inherent conflicts in the obligations imposed under two California statutes and summarily dismissed direct precedent and clear legislative intent to create two distinct statutes. In so doing, the Court of Appeal has created an untenable legal landscape in which CRAs have no way of knowing which law applies to their actions or what their total liability might be. This brief explains, from the perspective of CRAs, why the Court of Appeal's decision is bad for consumers, employers and CRAs, and why this Court should clarify the legal landscape.

LEGAL DISCUSSION

The Legislature enacted two distinct statutes to regulate agencies that gather information on consumers. The Investigative Consumer Reporting Agencies Act ("ICRAA") (Cal. Civil Code §1786 et seq.) governs reports containing information on a consumer's character, while the California Credit Reporting Agencies Act ("CCRAA") (Cal. Civil Code § 1785.1 et seq.) governs reports containing information on a consumer's creditworthiness.

Consistent with the legislative history and a plain reading of the statutes, two Courts of Appeal have honored the Legislature's intent by upholding the distinction between the statutes. Where information can be categorized as both character information and creditworthiness information, these courts have held that the statutory scheme cannot be constitutionally enforced because it does not give adequate notice of which act governs that information. *Ortiz v. Lyon Mgmt. Grp., Inc.*, 69 Cal. Rptr. 3d 66, 70, 75 (Cal. Ct. App. 2007); *Trujillo v. First Am. Registry, Inc.*, 68 Cal. Rptr. 3d 732, 740-41 (Cal. Ct. App. 2007).

The Court of Appeal in this case departed from precedent and announced a different view of the statutory framework. Glossing over

inherent conflicts between the two statutes and ignoring clear legislative intent, the Court of Appeal held that both statutes applied to background checks. *Connor v. First Student, Inc.*, 191 Cal. Rptr. 3d 404, 413-14 (Cal. Ct. App. 2015). The Court should reject that approach, which submits employers and CRAs to uncertain obligations and provides consumers with little clarity about their rights.

I. Application of the ICRAA to Background Check Information is Unconstitutionally Vague.

Due process requires that a statute be "sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions." *Lockheed Aircraft Corp. v. Superior Court of Los Angeles County*, 28 Cal. 2d 481, 484 (Cal. 1946)). Fundamental to that concept is that a CRA or employer should be able to readily understand which statute governs its actions.

1. Legislative Intent: Two Separate Statutory Schemes

"[I]n the construction of a statute the intention of the Legislature, . . . is to be pursued, if possible." Cal. Code Civ. Proc. § 1859. The legislative history of the CCRAA and ICRAA demonstrates that the Legislature intended to create two separate statutes that were complementary but did not overlap.

In 1975, the Legislature enacted two statutes modeled after the Fair Credit Reporting Act ("FCRA") (15 U.S.C. § 1680 et seq.). The first statute, the ICRAA, governs "investigative consumer reports." The ICRAA defines an investigative consumer report as containing "information on a consumer's character, general reputation, personal characteristics, or mode of living . . . ." Cal. Civ. Code § 1786.2(c). The second statute, the CCRAA, governs "consumer credit reports." The CCRAA defines a consumer credit report as "any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity," when that information is collected or used to establish the consumer's eligibility for personal credit, employment, or home rental. *Id.* § 1785.3(c).

The Legislature explicitly expressed its intention that the two statutes would govern separate acts. The ICRAA states: "The Legislature hereby intends to regulate investigative consumer reporting agencies *pursuant to this title* in a manner which will best protect the interests of the people of the State of California." *Id.* § 1786(g) (emphasis added). The CCRAA, on the other hand, states: "The

Legislature hereby intends to regulate consumer credit reporting agencies *pursuant to this title* in a manner which will best protect the interests of the people of the State of California." *Id.* §1785.1(e) (emphasis added).

The ICRAA and CCRAA, therefore, present a statutory scheme that requires character information to be governed by the ICRAA and creditworthiness information to be governed by the CCRAA. *See Ortiz*, 69 Cal. Rptr. 3d at 69. When information can be categorized as both character information and creditworthiness information—as is the case with the background check information at issue here—the statutory scheme cannot be constitutionally enforced because it does not give adequate notice of which act governs the information. *See id.* at 75.

The Legislature demonstrated its intent to create separate and independent regulations through the plain language of the statutes. As initially drafted, the ICRAA defined investigative consumer reports as those related to character information "obtained through personal interviews." Former Cal. Civ. Code § 1786.2(c) (amended in 1998). The CCRAA mirrored this definition and excluded character information obtained "through personal interviews," again demonstrating the

Legislature's intent to keep the statutes separate. Cal. Civ. Code § 1785.3(c). Thus, while both acts included reports prepared for employment purposes, *see id.* §§ 1785.3(f), 1786.2(f), they did not overlap because each statute expressly excluded reports governed by the other.

Connor's assertion that the statutes as originally enacted were not mutually exclusive, Connor Br. at 7-8, glosses over the explicit carve outs intended to eliminate potential overlap between the two statutes. The type of information at issue here—background check information bearing on a consumer's character that was not obtained through personal interviews—could only be governed by the CCRAA as initially enacted.

Indeed, all courts to consider this issue—even the *Connor* Court—acknowledge that the Legislature expressed its intent to create independent statutes. *See, e.g.*, *Connor*, 191 Cal. Rptr. 3d at 411 ("[U]nder the CCRAA and ICRAA as originally enacted, a consumer report could not be governed by both the CCRAA and the ICRAA."); *Ortiz*, 69 Cal. Rptr. 3d at 71 ("This statutory scheme—two separate statutes governing two kinds of [reports] depending on the type of

information they contain—indicates a legislative intent to distinguish between creditworthiness information and character information."); *Trujillo*, 68 Cal. Rptr. 3d at 740 ("The Legislature intended to differentiate between character information and creditworthiness.").

Furthermore, consistent with these decisions, Senator Leslie—the author of the 1998 amendment to the ICRAA—acknowledged the mutually exclusive domains of the ICRAA and CCRAA as initially enacted. He stated that the ICRAA as initially enacted "pertained only to reports compiled *through personal interviews* and did not pertain to information gleaned from any other sources, such as court documents or arrest records." (Connor's RJN Exh. G, p. 1 (emphasis in original).) Connor's arguments to the contrary are belied not only by the legislative record but also by every judicial determination bearing on the issue.

2. 1998 Amendments Create Uncertainty

When the Legislature amended the ICRAA in 1998, it introduced underlying uncertainty about what to do with information that could be classified as both creditworthiness and character information. The Legislature amended the ICRAA by replacing the phrase "obtained

through personal interviews" with the more expansive "through any means," but it did not amend the CCRAA accordingly. Cal. Civ. Code § 1786.2(c). Because of the amendment, it is no longer clear whether the ICRAA or CCRAA applies when information can be categorized as going to both character and creditworthiness, such as the case here.[1]

Connor argues that the legislature intentionally created this overlap, Connor Br. at 23-24, but the legislative history contradicts that interpretation. Senator Leslie explained in his letter to the members of the Senate Judiciary Committee that the 1998 amendment was intended to "plug numerous loopholes" that allowed "reporting agencies to escape the law's direct application." (Connor's RJN Exh. G, p. 3.) In other words, rather than create an overlapping scheme, Senator Leslie sought to bring actions that had previously been exempt from any law

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[1] Recognizing the overlap between the two statutes, the Legislature later amended the CCRAA in 2011 to reduce the circumstances under which there would be overlap between the CCRAA and ICRAA. Both statutes applied to reports compiled for "employment purposes," and the Legislature amended the CCRAA in an attempt to limit the situations a credit report could be requested for employment purposes. *See* Cal. Civ. Code § 1785.20.5(a) and Cal. Labor Code § 1024.5. If Connor were correct, and the legislature intended the statutes to overlap in such a way that CRAs and employers were required to comply with both statutes, the 2011 amendment would not have been necessary. *See* Cal. Civ. Code § 1785.20.5(a) and Cal. Labor Code § 1024.5. This amendment again demonstrated the Legislature's intent to keep the two statutes distinct and independent.

within the ambit of the ICRAA. (*Id.* at 4.) In a memorandum submitted to the Legislative Counsel, Kevin Smith explained that "[e]xisting law provides a framework for what is called an 'investigative consumer reporting agency,' but its definition only includes those reports compiled through personal interviews . . . . Most consumer reporting agency practices, therefore, are not covered by existing statute." (Connor RJN Exh. F at 3.) There is no acknowledgement or intention in the legislative history by any party that the 1998 amendment would create an overlapping and contradictory statutory scheme.[2]

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[2] Connor's reliance on Senator Leslie's letter to Governor Wilson is similarly misplaced. (Connor RJN Exh. H.) Rather than acknowledging any overlap, Senator Leslie expresses his desire for a mutually exclusive statutory scheme whereby the ICRAA would include "strengthen[ed] disclosure requirements for investigative reports similar to what already exists today for consumer credit reports." (*Id.* at 3.) Nowhere does the letter discuss or acknowledge the overlap between the ICRAA and the CCRAA. Indeed while the rationale for changing the legislation was to make the law that applied to investigative consumer reports more consistent with the law pertaining to consumer credit reports (i.e., by requiring consumer notification), the bill analysis specifically addresses the ICRAA's relationship to the CCRAA and merely deems it "consistent," but not overlapping. (Connor RJN Exh. J at 2, 7.)

3. *Statutes Should be Construed Consistently with One Another*

Construing the two statutes to govern discrete items of information, particularly where there is a long history of legislative intent supporting that interpretation, is an appropriate method of statutory interpretation. *Ortiz*, 69 Cal. Rptr. 3d at 71 ("Construing the two statutes to govern discrete items of information harmonizes the statutes, rather than collapsing them into one."); see also *Dyna-Med, Inc. v. Fair Emp't & Hous. Com.*, 43 Cal. 3d 1379, 1386-87 (Cal. 1987) (statutes must be harmonized).

The background checks at issue contained information from criminal record checks, as well as the subject's address history, driving records, and employment history. "[C]riminal background information fits both into the category of character evidence under the ICRAA and in the category of creditworthiness under the CCRAA." *Roe v. LexisNexis Risk Solutions Inc.*, 2013 WL 11246904, CV 12-6284 GAF, at *5 (C.D. Cal. Mar. 19, 2013); *see also Moran v. The Screening Pros, LLC*, 2012 WL 10655744, 2:12-cv-05808-SVW-AGR, at *7 (C.D. Cal. Sept. 28,

2012). The same is true for employment history information and other categories of information, such as check-writing history.[3]

Until 1998, CRAs were on notice that background check information like the type at issue here was subject to the CCRAA. After the 1998 amendment, CRAs are no longer on notice about whether the ICRAA or the CCRAA applies to those same actions.

Because of the uncertainty about whether the ICRAA or CCRAA applies to background check information that can be categorized as going to both character and creditworthiness, a reasonable person does not have notice of what act governs the information. *Ortiz*, 69 Cal. Rptr. 3d at 75. Obligations vary under the statutes, and therefore CRAs and employers are not on notice of what conduct is prohibited. Accordingly, application of the ICRAA to the background check information at issue here that could be categorized as going to both

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[3] The plain terms of the ICRAA encompass check-writing history by requiring disclosure of the "dates, original payees, and amounts of any checks." Cal. Civ. Code § 1786.10. Nevertheless, that information is plainly relevant to a consumer's creditworthiness. *See, e.g.*, *Greenway v. Information Dynamics, Ltd.*, 524 F.2d 1145, 1146 (9th Cir. 1975) (holding that issuance of an unpayable check bears on a consumer's creditworthiness).

character and creditworthiness is unconstitutionally vague. *Id.* (quoting *Cranston v. City of Richmond*, 710 P.2d 845, 849 (Cal. 1985)).

II. The *Connor* Court Disregards the Legislative Intent and Conflicts Between the ICRAA and the CCRAA.

The *Connor* Court held that both the ICRAA and the CCRAA could apply to the background check information at issue because there was no "positive repugnancy" between the two statutes. *Connor*, 191 Cal. Rptr. 3d at 413. This approach not only minimizes the importance of due process but also disregards legislative intent and actual conflicts between the statutes.

Two statutes cannot mutually coexist if (1) there has been "clearly expressed congressional intention to the contrary;" ***or*** (2) there is a "positive repugnancy" between the statutes. *J.E.M. AG Supply, Inc. v. Pioneer Hi-Breed Int'l, Inc.*, 534 U.S. 124, 143-44 (2001). ***Both*** of these conditions are present here.

As discussed above, the Legislature demonstrated its intent that the statutes should be independent. *See Connor*, 191 Cal. Rptr. 3d at 411 ("[U]nder the CCRAA and ICRAA as originally enacted, a consumer report could not be governed by both the CCRAA and the ICRAA."); *Ortiz*, 69 Cal. Rptr. 3d at 71 ("This statutory scheme—two separate

statutes governing two kinds of [reports] depending on the type of information they contain—indicates a legislative intent to distinguish between creditworthiness information and character information."); *Trujillo*, 68 Cal. Rptr. 3d at 740 ("The Legislature intended to differentiate between character information and creditworthiness.").

In addition to the clear legislative intent that the statutes should be construed independently, the ICRAA and the CCRAA impose different obligations on persons compiling or requesting reports that cannot be reconciled. *Ortiz*, 69 Cal. Rptr. 3d at 71. Moreover, consumers also have different rights and remedies depending on whether the report contains information about creditworthiness or character information. *Id.*

To name just a few of the conflicts:

1. Permissible Purposes of Consumer Reports

Under the CCRAA, a consumer credit reporting agency can furnish a consumer credit report for a number of enumerated purposes. *See* Cal. Civ. Code § 1785.11. The CCRAA also includes a catchall provision that allows the furnishing of consumer credit reports if there

is "any legitimate business need for the information in connection with a business transaction involving the consumer." *Id.* § 1785.11(3)(F).

In contrast, the ICRAA does not include a permissible purpose for credit underwriting, imposes a much narrower permissible purpose restriction with respect to insurance transactions,[4] and includes no comparable catchall provision for legitimate business purposes. *Compare id.* § 1785.11 *with id.* § 1786.12. CRAs use this catchall provision to generate reports for legitimate business purposes not enumerated in the statute, such as check cashing or the opening of a deposit account.

Because character information falls under both statutory schemes, the creation of a report might be permissible under one statute but impermissible under the other, creating a trap for CRAs who might believe themselves to be providing consumer report information in

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[4] With respect to insurance transactions, the CCRAA provides a permissible purpose "in connection with the underwriting of insurance involving the consumer, or for insurance claim settlements," while the ICRAA permits an investigative consumer report to be obtained for the purpose of "serving as a factor in determining a consumer's eligibility for insurance or the rate for any insurance." *Compare* Cal. Civ. Code § 1785.11(a)(3)(C) *with id.* § 1786.12 (d)(2). That is, the CCRAA permits consumer reports to be provided for settlement of claims and for any purpose "in connection with underwriting," while the ICRAA only permits investigative consumer reports to be provided for eligibility and rating determinations.

compliance with the CCRAA, but are at risk of subsequently being sued for providing investigative consumer report information in violation of the ICRAA. Said another way, a CRA that is seeking to comply with both statutes would be unable to sell consumer report information for many of the purposes permitted under the CCRAA, which would frustrate one of the Legislature's purposes in enacting the CCRAA, specifically, "meeting the needs of commerce for consumer credit, personnel, insurance, [or] hiring of a dwelling unit." *Id.* § 1785.1(d).

2. *Obligation to Disclose Source Information*

Under the CCRAA, a consumer is generally entitled to disclosure of source information used to generate the report. *Id.* at 1785.10(c). In contrast, under the ICRAA, a consumer is generally not entitled to disclosure of source information. *Id.* § 1786.10(b)(1).

3. *Obligation to Disclose Consumer Report Information*

Under the CCRAA, a CRA must disclose to the consumer upon request any recipients of the consumer's credit report within the preceding *12 months*, or *two years* if the recipient obtained the report for employment purposes. *Id.* § 1785.10(d)(1)(A), (B). Under the ICRAA, a CRA must disclose to the consumer any recipients of the

consumer's investigative report within the preceding *three years*, regardless of the purpose. *Id.* § 1786.10(c)(1), (2).

4. Obligation to Retain Consumer Report Information

Under the CCRAA, a CRA must *permanently* retain certain consumer information. *Id.* § 1785.14(b). Under the ICRAA, a CRA must retain the entire investigative consumer report for *two years*. *Id.* § 1786.20(b).

5. Consumer's Right to Obtain a Copy of Consumer Report Information

Under the CCRAA, a consumer may obtain a copy of a consumer credit report for *$8 or less*. *Id.* § 1785.15(f). Under the ICRAA, a consumer may obtain a copy of the report for the *actual cost* of the duplication. *Id.* § 1786.22(b)(1).

6. Consumer's Right to Lodge Statement of Dispute

Under the CCRAA, a consumer may lodge a *100-word* statement of dispute. *Id.* § 1785.16(f). Under the ICRAA, a consumer may lodge a *500-word* statement of dispute. *Id.* § 1786.24(i).

This is not simply a case, as the *Connor* Court suggests, where two statutes govern the same conduct. It is a case where two statutes govern the same conduct, and under one statute a CRA's actions might

be legal but under a second statute the very same actions might not be legal.

Moreover, this is a case where two statutes provide for drastically different remedies. Under the CCRAA, a consumer is entitled to recover actual damages plus punitive damages limited to *$5,000* for a willful violation. *Id.* §§ 1785.31(a)(1), (2)(A), (B). Under the ICRAA, a consumer is entitled to recover actual damages or statutory damages of *$10,000*, whichever is greater, *plus* punitive damages for a willful violation. *Id.* §§ 1786.50(a)(1), (b). Allowing such draconian remedies for a violation of the CCRAA undercuts the Legislature's intent to create a complementary statutory scheme and the balance that is struck with respect to the CCRAA. This "repugnancy" precludes enforcement of both statutes to the same conduct.

III. The *Connor* Approach Submits Employers and CRAs to Uncertain Obligations and Provides Consumers With Little Clarity About Their Rights.

By holding that both the CCRAA and ICRAA can apply to background check information that could be categorized as either character or creditworthiness information, CRAs and employers are put in an untenable position. CRAs and employers do not have notice of

which statute applies to their actions. Indeed, there is no "rational basis" upon which a CRA or employer could decide which statute should govern their actions and so they must guess under which statute their actions will be judged. *Ortiz*, 69 Cal. Rptr. 3d at 75. This is precisely the kind of harm that the Due Process Clause seeks to avoid.

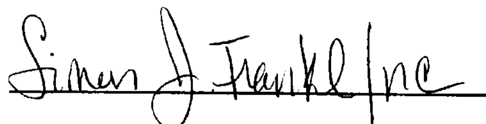
Connor acknowledges that there are categories of reports that are subject to both the CCRAA and ICRAA, Connor Br. at 10, but fails to recognize the practical implications of that fact. Under the *Connor* Court's logic, nearly every CRA's actions bearing on background check information would fall under both the CCRAA and ICRAA as amended in 1998.

CRAs perform the essential function of gathering large amounts of consumer information and making that information available for use in credit or employment decisions. Their actions affect the vast majority of adult Americans. It is imperative that CRAs have notice of which statute governs their actions.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioner's brief, the decision of the Court of Appeal should be reversed.

April 27, 2016



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