S229428

Supreme Court Case No.:

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

PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)):

	Name of Interested Entity or Person	Nature of Interest
1.	First Student, Inc./First Transit, Inc.	Petitioners
2.	FirstGroup PLC, FGA America, Inc.	Petitioners' Parent Companies.

Dated: September 21, 2015

RONALD A. PETERS
BENJAMIN A. EMMERT
LITTLER MENDELSON
Attorneys for Defendants and Appellees
FIRST STUDENT, INC. and FIRST TRANSIT, INC.

I. PETITION FOR REVIEW

To the Honorable Chief Justice Tani Cantil-Sakauye and the Honorable Associate Justices of the Supreme Court of California:

First Student, Inc. and First Transit, Inc. (collectively referred to as "First") hereby respectfully petition this Court for review of a published decision of the California Court of Appeal, Second Appellate District, filed August 12, 2015, that reversed the trial court's order granting First's motion for summary judgment as to Plaintiff Eileen Connor's causes of action based on an alleged violation of California's Investigative Consumer Reporting Agencies Act ("ICRRA"). Cal. Civ. Code §§ 1786.1 *et seq.* A true and correct copy of this decision is attached hereto as Exhibit A.

The Second District's decision has created an actual conflict between it and the Fourth Appellate District on a commonly reoccurring important point of law – whether the ICRAA is unconstitutionally vague as applied to consumer reports that are simultaneously subject to the separate and distinct statute, California's Consumer Credit Reporting Agencies Act ("CCRAA") result of its 1998 amendment that expanded the ICRAA's scope and reach. Compare *Connor v. First Student, Inc.* (2d Dist. 2015) 239 Cal.App.4th 526, 538-539 with *Ortiz v. Lyon Management Group, Inc.* (4th Dist. 2007) 157 Cal.App.4th 604, 619.

The Fourth Appellate District in *Ortiz* held the ICRAA's 1998 amendments caused it to be unconstitutionally vague and unenforceable as to the consumer reports at issue in this case because it "fail[ed] to provide adequate notice to persons who compile or request [consumer reports] that may contain information" simultaneously subject to the CCRAA and the ICRAA. *Ortiz,* 157 Cal.App.4th at 619. In reversing the trial court's grant of summary judgment in favor of First, the Second Appellate District in *Connor* disagreed with the *Ortiz'* Court's reasoning finding ICRAA was not unconstitutionally vague as applied to the subject consumer reports because it believed there were "no 'positive repugnancy' between the two laws." *Connor,* 239 Cal.App.4th at 538.

This conflict between the Second and Fourth Appellate Districts has created significant uncertainty how other Appellant Courts in California, as well as Federal Courts applying California law, will decide the same issue. See *Auto Equity Sales, Inc. v. Superior Court (Hesenflow)* (1962) 57 Cal.2d 450.

Additionally, in ruling the way they did, the Second Appellate District failed to consider what effect the breadth of the 1998 amendment to ICRAA would have on the ICRAA's express exclusion of reports containing information pertaining to a "consumer's credit record". In fact, by ruling the ICRAA overlaps with the CCRAA but is not unconstitutionally vague, the Second Appellate District essentially eviscerated the CCRAA. This is because every modern credit report, after 1998, regardless of its purpose, would necessarily contain information subject to ICRAA and therefore, according to the Second Appellate District, would require compliance with the ICRAA's overlapping but wholly different provisions. The Second Appellate District's decision could therefore fundamentally change the way California's credit and financial institutions do business in a way that is at odds with the express intentions of both the CCRAA and the ICRAA. This could have dire consequences for California.

Accordingly, review should be granted to resolve this conflict and secure uniformity of decision and settle this important question of law.

II. ISSUE PRESENTED FOR REVIEW

1. Whether the Second Appellant District correctly concluded that, contrary to the Fourth Appellant District's conclusion on the same issue, the California Legislature's 1998 amendment to the ICRAA, as applied in this action, provided adequate notice that it and not the CCRAA applied to the consumer reports regarding Ms. Connor.

III. HOW THE CASE PRESENTS A GROUND FOR REVIEW

California Rule of Court 8.500(a) states, in pertinent part, "[a] party may file a petition in the Supreme Court for review of any decision of the Court of

Appeal." The California Supreme Court may also grant review of a Court of Appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Cal. Rule of Ct. 8.500(b)(1).

Review is appropriate in this action to secure uniformity between California's Appellate Courts on an important question of law - whether California's ICRAA is unconstitutionally vague as applied to consumer reports obtained by employers on applicants, prospective employees, and employees used for the purpose of evaluating an individual for employment, promotion, reassignment, or retention as an employee when the same reports are also simultaneously subject to the CCRAA .

As a result of the Second Appellate District published decision in this action, that the ICRAA is not unconstitutionally vague and does not unconstitutionally overlap with the CCRAA, there exists an actual conflict between Second Appellate District and the Fourth Appellate District on this important matter. Specifically, in *Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604 and *Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, the Fourth Appellant District held "[t]he 1998 amendment rendered the ICRAA unconstitutional" to the extent it covers consumer reports that are concurrently subject to the CCRAA. *Ortiz*, 157 Cal.App.4th at 619; *Trujillo,* 157 Cal.App.4th at 640. Federal Courts that have considered this same issue have all followed *Ortiz* and *Trujillo*. See *Roe v. LexisNexis Risk Solutions, Inc.* (C.D. Cal. 2013) 2013 U.S. Dist. LEXIS 88936,*14-18; *Moran v. The Screening Pros.* (C.D. Cal. 2012) 2012 U.S. Dist. LEXIS 158598,*15-22.

In this action, the Second Appellate District disagreed with the Fourth Appellant District's reasoning and held the ICRAA is not unconstitutionally vague notwithstanding the fact it does not provide notice that a party requesting a consumer report that is covered by, and in compliance with the CCRAA's requirements, can be subject to the ICRAA's $10,000 penalty if

he/she/it fails to also comply with the ICRAA's separate and distinct more stringent requirements. *Connor*, 239 Cal.App.4th at 530.

IV. THIS PETITION FOR REVIEW IS PROPER AND TIMELY

On August 12, 2015, the Appellate Court filed its opinion granting Ms. Connor's appeal and reversing the trial court's order granting First's motion for summary judgment. The Appellate Court's opinion became final on September 11, 2015. Cal. R. Ct. 8.264(b)(1). The deadline for any party to petition this Court for review is September 21, 2015. Cal. R. Ct. 8.500(e)(1). First's Petition is filed on or before September 21, 2015, and is therefore timely.

V. BACKGROUND CONTEXT NECESSARY TO EXPLAIN HOW CASE PRESENTS A GROUND FOR REVIEW

A. Introduction

Ms. Connor is one of approximately 1400 individuals who filed this mass action against Defendant First. Ms. Connor, and each one of the other similarly situated plaintiffs, allege First violated California's ICRAA when it procured or caused to be prepared a consumer report on her without obtaining her express written consent as required by California's ICRAA. Ms. Connor, as well as each of the other plaintiffs in this action, seek recovery of the ICRAA's $10,000 penalty for each alleged violation of the ICRAA.

B. 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. (JA, Vol. I, pp. 37-38.) Ms. Connor claims HireRight Solutions is consumer reporting agency that prepared the subject background checks on her. (*Id.*)

3. Eileen Connor.

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

C. 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.*)

D. First Requests HireRight Solutions Perform Background Checks On Certain Former Laidlaw Employees Including Appellant.

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.)

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.) After First acquired Laidlaw in October 2007, it sent her the Safety Pack, which included the Notice. (*Id.* at p. 166.) After it did, First requested HireRight Solutions prepare a background report on her. This report was prepared by using electronic databases and was based on publically available information and did not contain any 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 a number of traffic accidents and First contemplated terminating her employment. (*Id.*) Rather than fire her, First allowed Ms. Connor to return to work as a driver's aide. (*Id.*) In connection with returning to work in this position, Ms. Connor was required 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.) 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 First requested HireRight Solutions perform a new background check on her on June 1, 2010. (JA, Vol. I, pp. 232-244.) While not required, Ms. Connor signed another Notice in conjunction with this background report. (JA, Vol. I, p. 230.) Again, as with Ms. Connor's prior background reports, this report was prepared by using electronic databases and did not contain any information obtained from non-public sources. (JA, Vol. VI, pp. 951-952.) It is undisputed that she 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.)

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.*)

Indeed, 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 generally 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 Appellant 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, issued the decision in *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 the landlords 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 requires. (*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 amendment changed the ICRAA's definition of an "investigative consumer report" as being one "whose information is "obtained through personal interviews" to being one whose information is "obtained through any means." See Hist. and

Statutory Notes, Civ. Code § 1786.2(c). The amended definition, which was in place at the time period relevant to this action and today, states:

> The term "investigative consumer report" means a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means.

Cal. Civ. Code § 1786.2(c).

Significantly, the Legislature made no corresponding amendments to the CCRAA. Indeed, the CCRAA today still applies to all consumer reports except those:

> Containing information solely on a consumer's character, general reputation, personal characteristics, or mode of living, which is obtained through personal interviews . . . .

Cal. Civ. Code § 1785.3(c)(5).

I. Procedural Requirements To Request A Consumer Report Under The CCRAA And The ICRAA And Penalties For A Proven Violation.

While the CCRAA and the ICRAA both authorize an employer to obtain a consumer report for "employment purposes," the CCRAA and the ICRAA impose significantly different procedural requirements to do so and provide significantly different penalties for a proven violation.

During the time period relevant to this action, the CCRAA required the requesting party:

1. Inform "the person [in writing] that a report will be used";
2. State "the source of the report"; and
3. Give the subject of the report a form "contain[ing] a box that the person may check off to receive a copy of the [] report."

See Cal. Civ. Code § 1785.20.5(a), Historical and Statutory Notes, Stats.2011, c. 724.

The ICRAA however, requires the requesting party:

1. Provide the subject of the report a written disclosure:
   a. Stating an investigative consumer report may be obtained;
   b. Identifying the permissible purpose of the report;
   c. Stating the report may include information on the consumer's character, general reputation, personal characteristics, and mode of living;
   d. Identifying the name, address, and telephone number of the investigative consumer reporting agency preparing the report; and
   e. Notifying the consumer in writing of the nature and scope of the investigation requested, including a summary of the provisions of California Civil Code section 1786.22; and
2. The Consumer authorizes the preparation and procurement of the report in writing.

Cal. Civ. Code § 1786.16(a).

The CCRAA and the ICRAA also provide significantly different penalties for a proven violation of their provisions. The CCRAA authorizes an aggrieved party to recover:

- In the case of a negligent violation, actual damages, including court costs, loss of wages, attorneys' fees and, when applicable, pain and suffering; or

- In the case of a willful violation, actual damages incurred as set forth above and punitive damages of not less than one hundred dollars ($100) nor more than five thousand dollars ($5,000) for each violation as the court deems proper.

Cal. Civ. Code § 1785.31.

The ICRAA states an aggrieved party may recover:

> • Any actual damages sustained by the consumer or ten thousand dollars ($10,000), whichever sum is greater, plus their attorneys' fees and court costs; as well as punitive damages if the defendant's conduct is established to be grossly negligent or willful.

Cal. Civ. Code §§ 1786.50(a), (b).

It is against this backdrop that Appellant's action against First is brought.

J. Ms. Connor's Lawsuit.

As states above, Ms. Connor is one of appropriately 1400 plaintiffs in this mass action. At the time First filed its motion for summary judgment, Ms. Connor's operative complaint was the Consolidated Fourth Amended Complaint ("CFAC"). The CFAC asserted four causes of action against First for alleged violations of the ICRAA (the First, Second, Sixth, and Seventh Causes of Action). (JA, Vol. I, pp. 34-90.) Each of these causes of action was premised on the same allegations, that First procured or caused to be prepared "investigative consumer reports," as defined in the ICRAA, on her without providing her the requisite disclosures and/or obtaining her written consent. (*Id.* at pp. 36-39.) The only distinction between the causes of action is that the First and Sixth Causes of Action allege Appellant suffered some unidentified emotional distress damages and the Second and Seventh Causes of Action do not. (*Id.* at pp. 41-53.)

K. First's Motion For Summary Judgment

On August 5, 2013, First filed its motion for summary judgment as to Ms. Connor's ICRAA claims. First's motion argued that California's ICRAA was unconstitutionally vague as applied to Ms. Connor's subject consumer reports because its 1998 amendment caused it to unconstitutionally overlap with the separate and distinct statute, the CCRAA pursuant to *Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604 and *Trujillo v. First American Registry,*

Inc. (2007) 157 Cal.App.4th 628 and the federal courts that have considered this issue. See *Roe v. LexisNexis Risk Solutions, Inc.* (C.D. Cal. 2013) 2013 U.S. Dist. LEXIS 88936,*14-18; *Moran v. The Screening Pros.* (C.D. Cal. 2012) 2012 U.S. Dist. LEXIS 158598,*15-22.

On December 18, 2013, the trial court granted First's motion finding:

> Pursuant to the holdings in *Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604 and *Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, the ICRAA is unconstitutionally vague and unenforceable as applied to Plaintiff's claims against First Student, Inc. and First Transit Inc.
> (JA, Vol. X, p. 2298.)

The trial court based its decision on the fact that Ms. Connor produced no evidence "[t]he background reports that First Student, Inc. procured and/or caused to be prepared on Plaintiff [contained] information obtained through personal interviews." (*Id.* at p. 2298:24-27.) Accordingly, the trial court correctly found Appellant's subject background reports were simultaneously subject to both the CCRAA and the ICRAA. (*Id.*) Because the CCRAA and the ICRAA contain different procedural requirements before a consumer report can be requested and contain significantly different penalties for a proven violation of their provisions, the trial court correctly found their simultaneous coverage caused the ICRAA to be unconstitutionally vague and unenforceable as applied to this action as a matter of law under *Ortiz,* 157 Cal.App.4th at 604 and *Trujillo,* 157 Cal.App.4th at 628.

L. Mr. Connor's Appeal Of The Trial Court's Decision.

Ms. Connor appealed the trial court's granting First's motion for summary judgment on May 7, 2014, to California's Second Appellate District.

M. The Second Appellate District Grant's Ms. Connor's Appeal Reversing The Trial Court's Grant Of First's Motion For Summary Judgment Because It Believed The 1998 Amendment To The ICRAA Did Not Rendered It Unconstitutionally Vague.

On August 12, 2015, the Second District issued its decision on Ms. Connor's appeal holding that, contrary to the Fourth Appellate District in *Ortiz* and *Trujillo*, the ICRAA was not unconstitutionally vague and did not unconstitutionally overlap with the CCRAA. The *Connor* Court reached this conclusion because, unlike the *Ortiz* and *Trujillo* Courts that found the ICRAA and the CCRAA were meant to be separate and distinct statutes that applied to different types of consumer reports and therefore an individual or entity needed to only comply with the one governing the consumer report they procured or caused to be prepared, the *Connor* Court held an individual or entity was not prevented from complying with both statutes at the same time. In other words, unlike the *Ortiz* and *Trujillo* Courts that sought to continue to give effect to the Legislature's express differentiation between the two statutes, the Second District essentially held the ICRAA's 1998 amendment caused it to swallow the CCRAA in all but certain limited specifically enumerated situations. Accordingly, in the Second District's view, a defendant can be held liable for violating the ICRAA even though it engaged in perfectly legal conduct that was specifically authorized by the CCRAA.

N. Review Is Necessary To Secure Uniformity Of Decisions Across California's Appellate Courts And To Settle An Important And Reoccurring Question Of Law.

As stated above, review is proper in this action to resolve the conflict between California's Second and Fourth Appellate Districts as well as to resolve the conflict between the Second Appellate District and the federal district court's that have considered the constitutionally of the post-1998 ICRAA in the context of consumer reports procured or caused to be prepared for employment purposes.

This issue is of significant importance to California's employers as it will resolve the uncertainty as to whether the CCRAA or the ICRAA applies to consumer reports that are procured or caused to be prepared for employment purposes – such as background reports that are conducted as a condition of an employee's employment.

VI. ARGUMENT

A. The Supreme Court Should Grant Review To Provide Uniformity Between California's Appellate Courts Regarding Whether The ICRAA's 1998 Amendments Caused It To Be Unconstitutionally Vague And Unenforceable As Applied To Consumer Reports Obtained For Employment Purposes.

It is well-established that a "'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts*, 468 U.S. At 629; *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391. A vague statute cannot be upheld because "'we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763. "A statute should 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* (1946) 28 Cal.2d 481, 484. The "void-for-vagueness doctrine" represents "the underlying concern [that a statute comply with] the core due process requirement of adequate notice." *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115.

1. California's Fourth Appellate District Has Held The Post-1998 ICRAA Is Unconstitutionally Vague And Unenforceable As A Matter Of Law.

In *Ortiz* and *Trujillo*, California's Fourth Appellate District held the ICRAA's 1998 amendment, which removed the limitation it only applied to

consumer reports containing information bearing on an individual's "character, general reputation, personal characteristics, or mode of living . . . obtained through personal interviews," caused it to be unconstitutionally vague, at least as to consumer reports that could simultaneously be subject to the separate and distinct statute, the CCRAA. Federal district courts that have considered the constitutionality of the overlap between the CCRAA and the ICRAA have applied *Ortiz* and *Trujillo* to likewise find the post 1998 ICRAA is unconstitutionally vague for the same reasons. See *Roe,* 2013 U.S. Dist. LEXIS 88936,*14-18; *Moran v. The Screening Pros.* (C.D. Cal. 2012) 2012 U.S. Dist. LEXIS 158598,*15-22. Indeed, the Second Appellate District in *Connor* is the first court to reject the *Ortiz* and *Trujillo* Court's reasoning and holding.

The *Ortiz, Trujillo* and the federal courts that have considered the constitutionality of the post 1998 ICRAA as to consumer reports that are arguably covered by both the CCRAA and the ICRAA reached the conclusion that the ICRAA was unconstitutionally vague based on the fact that California's Legislature intended the CCRAA and the ICRAA to operate as separate and distinct statutes. Indeed, from their inception, these two statutes were intended to govern different specific types of consumer reports.

Prior to 1998 the CCRAA and the ICRAA did not overlap because each statute expressly excluded reports governed by the other. Compare Cal. Civ. Code § 1785.3(c) with Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1; *Ortiz*, 157 Cal.App.4th at 614. Moreover, prior to 1998, a party requesting a consumer report could easily determine which statute applied by simply looking at the manner by which the information in the report was obtained. Compare Cal. Civ. Code § 1785.3(c) with Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1; *Ortiz*, 157 Cal.App.4th at 614-615 ("[t]his statutory scheme – two separate statutes governing two kinds of [consumer] reports depending on the type of information they contain – indicates a legislative intent to distinguish between creditworthiness information and character information").

This intentional differentiation is further evidenced by the fact the CCRAA and the ICRAA "impose different obligations on persons compiling or requiring [consumer] reports, depending on whether the information therein pertains to creditworthiness or character." *Ortiz*, 157 Cal.App.4th at 614. Indeed, "[n]othing in the statutes suggests any one item of information may constitute both creditworthiness and character information such that it alone subjects a [consumer] report to both statutes" at the same time. (*Id.* at 615.)

As pertinent to this action, the *Ortiz* and *Trujillo* Courts found that, prior to the ICRAA's 1998 amendments, an individual could determine whether a consumer report was subject to the CCRAA or the ICRAA by looking at the manner by which the information was obtained. *Ortiz*, 157 Cal.App.4th at 616. Specifically, prior to 1998, the ICRAA applied to consumer reports that contained "information on a consumer's character, general reputation, personal characteristics, or mode of living . . . obtained through personal interviews" while the CCRAA expressly excluded reports containing such information from its ambit. *Ortiz*, 157 Cal.App.4th at 616; see also Cal. Civ. Code § 1785.3(c) ("Consumer credit report . . . does not include . . . (5) any report containing information solely on a consumer's character, general reputation, personal characteristics, or mode of living . . . obtained through personal interviews").

California's Legislature removed this differentiation by its 1998 amendment to the ICRAA and obliterated the distinction between consumer reports subject to the CCRAA and those subject to the ICRAA. Cal. Civ. Code §§ 1786.2(c), (f), Stats 1998, c. 988, § 1. By doing so, it rendered the ICRAA unconstitutionally vague, at least as to reports that were simultaneously subject to both statutes. *Ortiz*, 157 Cal.App.4th at 617, 619.

Specifically, the 1998 Amendment significantly broadened the ICRAA's definition of "investigative consumer reports" from being limited only to those reports containing information on an individual's character obtained only through "personal interviews," to include all reports containing such character

information "obtained through any means." Cal. Civ. Code § 1786.2(c); Cal. Civ. Code §§ 1786.2(c), (f), Stats 1998, c. 988, § 1. Whether the CCRAA or the ICRAA now applies to a specific consumer report depends on the type of information contained in the report, not on the method by which the information was collected. However, as the *Ortiz, Trujillo, Roe*, and *Moran* Courts have each found, this is a false distinction.

Even Ms. Connor admits the same information, or the same types of information, can simultaneously fit equally well within the rubric of information bearing on an individual's character as well as their credit worthiness. Because the post amendment ICRAA and the CCRAA simultaneously apply to consumer reports containing such information obtained through any means other than through personal interviews, there is no longer any functional distinction between reports subject to one statute versus the other. *Ortiz*, 157 Cal.App.4th at 617, 619. Indeed, unless a consumer report is specifically excluded by the CCRAA or the ICRAA, and therefore necessarily falls under the coverage of the other, it is now impossible for persons of ordinary intelligence to determine whether the CCRAA or the ICRAA apply to consumer reports containing information bearing on their character. *Ortiz*, 157 Cal.App.4th at 619.

Accordingly, as *Ortiz, Trujillo, Roe* and *Moran* Courts held, since 1998 the ICRAA no longer complies with the due process requirements to give adequate notice of whether or not it applies to a given consumer report. Rather, since the 1998 amendment, an individual requesting a consumer report covered by the CCRAA could comply with that statute but nevertheless be found to have violated the ICRAA and be subjected to its $10,000 penalty. In other words, a defendant can be found liable for the ICRAA's civil penalty for engaging in completely legal conduct. In fact, that is exactly what Ms. Connor is attempting to do in this action.

a. The Undisputed Evidence Established First Requested The Subject Consumer Reports On Ms. Connor In Compliance With California's CCRAA.

Even Ms. Connor does not dispute that First complied with the CCRAA when it requested the consumer reports on her. Appellant admits the CCRAA applies to consumer reports obtained for an "employment purpose." Cal Civ. Code § 1785.3(f). The term "employment purpose" under the CCRAA, like the ICRAA is defined as when a report is "used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee." Cal Civ. Code § 1785.3(f); Cal. Civ. Code. § 1786.2(f); see also Cal. Civ. Code § 1785.18(b) (stating consumer reports covered by the CCRAA include reports obtained for employment purposes), Cal. Civ. Code § 1875.20.5(a) (identifying the pre-request disclosure requirements an employer must comply with before requesting a consumer report covered by the CCRAA for employment purposes).

Ms. Connor also admits First requested and used the background reports on her to "in making decisions about Plaintiff's employment," *i.e.* it used it for an employment purpose. (JA, p. 36:1-3.) Accordingly, Ms. Connor admits that First requested the subject background reports for a purpose specifically authorized by the CCRAA. Cal Civ. Code § 1785.3(f).

Ms. Connor also admits that First complied with the CCRAA's requirements before requesting the subject consumer reports. At the time First requested Ms. Connor's consumer reports, the CCRAA required an employer "provide [her] written notice" that:

1. Informed her "that a report will be used";
2. Stated "the source of the report"; and
3. "[C]ontain[ed] a box that [she] may check off to receive a copy of the [] report."

See Cal. Civ. Code § 1785.20.5(a), Historical and Statutory Notes, Stats.2011, c. 724. It is undisputed that First complied with these requirements.

Ms. Connor admits First gave her the Notice. (JA, Vol. I, p. 166.) She also admits that the Notice stated a "consumer report" may be prepared on her "[i]n connection with [her] employment or application for employment." (JA, Vol. I, pp. 213, 230.) She further admits that the Notice identified the source(s) of the report, by identifying the sources of the information on which the report would be based and the name of the company preparing the report. (*Id.*) She also admits that the Notice included a box Appellant could check to request a copy of the report. (*Id.*)

First's compliance with the CCRAA is further established by Ms. Connor's admission that none of the subject background reports contained information obtained by personal interviews – *i.e.* they contained no information expressly excluded by the CCRAA. (JA, Vol. IV, p. 951-952); Cal. Civ. Code § 1785.3(c). Indeed, the trial court specifically found her background reports did not contain any such prohibited information. (JA, Vol. X, p. 2298:14-18.) Accordingly, it cannot be disputed that First requested the subject background reports in a manner specifically authorized by the CCRAA.

Despite the fact First complied with the ICRAA, Ms. Connor argued, and California's Second Appellate District held "the ICRAA applies to the background checks at issue in this case, and the fact the CCRAA might also apply to those same background checks does not render the ICRAA void for vagueness." *Connor,* 239 Cal.App.4th at 532.

2. California's Second Appellate District Has Held The Post-1998 ICRAA Is Not Unconstitutionally Vague And Unenforceable In Contrast To The Fourth Appellate District.

Unlike the *Ortiz, Trujillo, Roe*, and *Moran* Courts, the *Connor* Court found the CCRAA and the ICRAA were not meant to be separate and distinct statutes that were intended to govern separate and distinct consumer reports. Indeed, unlike these prior courts, the *Connor* Court held "any one item of information [need not] be classified as either creditworthiness or character

information, but not both, because a single report could be governed by either the CCRAA or the ICRAA." *Connor*, 239 Cal.App.4th at 537. The *Connor* Court disagreed with the *Ortiz* Court's decision because, in its view, "[t]he *Ortiz* court's statement . . . that a consumer report cannot be subject to both acts (*Ortiz*, *supra*, 157 Cal.App.4th at 617) simply is not supported by the language of the acts as now amended." *Connor*, 239 Cal.App.4th at 538. The *Connor* Court held individuals and entities that request consumer reports that are simultaneously subject to both the CCRAA and the ICRAA must comply with the ICRAA, "regardless whether [they] complied with the CCRAA." *Connor*, Cal.App.4th at 539. By this decision, the *Connor* Court held First, as well as any other individual or entity that requests a consumer report that is governed by the CCRAA and in complete compliance with that statute's procedural requirements, can nevertheless potentially be held liable for the ICRAA's $10,000 penalty if the consumer report is potentially also covered by the ICRAA. In other words, the *Connor* Court held a defendant can be potentially assessed a $10,000.00 penalty for engaging in completely legal conduct.

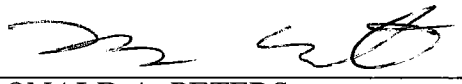
3. California's Second Appellate District's Decision Has Created A Split Between The Districts That Must Be Resolved.

As a result of the *Connor* Court's decision, there currently exists a split between the Second and Fourth Appellate District regarding the constitutionality of the post 1998 ICRAA. This split will cause the trial courts in these districts to rule differently even if confronted with the same factual situations. It has also created uncertainty as to how the trial courts in other districts will rule when confronted with this issue. *Auto Equity Sales*, 57 Cal.2d at 450. Given numerous employers use consumer reports for employment purposes, whether a background report is subject to the CCRAA or the ICRAA is an important issue of law that should be resolved by this Court.

VII. CONCLUSION

For the foregoing reasons, it is respectfully submitted that review of the Second Appellant District's opinion in warranted and should be granted.

Dated: September 21, 2015



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CERTIFICATE OF WORD COUNT

(Cal Rules of Ct. Rule 8.504(d)(1))

Pursuant to California Rule of Court 8.204(c) and 8.486(a)(6), the text of this petition, including footnotes and excluding the cover information, Certificate of Interested Entities or Persons, table of contexts and table of authorities, signature blocks and the certification, consists of 6,590 words in 13-point New Times Roman types as counted by the Microsoft Word word-processing program used to generate the text.

Dated: September 21, 2015

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Exhibit A

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

B256075

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

239 Cal. App. 4th 526; 2015 Cal. App. LEXIS 695; 165 Lab. Cas. (CCH) P61,625

August 12, 2015, Opinion Filed

NOTICE:

As modified Aug. 14, 2015.

SUBSEQUENT HISTORY: Modified by *Connor v. First Student, Inc., 2015 Cal. App. LEXIS 699 (Cal. App. 2d Dist., Aug. 14, 2015)*

PRIOR HISTORY: [**1] APPEAL from a judgment of the Superior Court for Los Angeles County, No. JCCP4624, John Shepard Wiley, Jr., Judge.

DISPOSITION: Reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

An employee filed suit against her employer and the investigative consumer reporting agencies hired by the employer to conduct background checks of employees that included criminal records and driving records, alleging violations of the Investigative Consumer Reporting Agencies Act (ICRAA) (*Civ. Code, § 1786 et seq.*). The trial court dismissed the lawsuit after granting the employer's motion for summary judgment. (Superior Court of Los Angeles County, No. JCCP4624, John Shepard Wiley, Jr., Judge.)

The Court of Appeal reversed, holding that the background checks were subject to the ICRAA because they were investigative consumer reports (*Civ. Code, § 1786.2, subd. (c)*) and used for employment purposes (*§ 1786.2, subd. (f)*). Even if the background checks also could be consumer credit reports (*Civ. Code, § 1785.3, subd. (c)*) and thus subject to the Consumer Credit Reporting Agencies Act (*Civ. Code, § 1785.1 et seq.*), there was no constitutional vagueness in requiring the employers to comply with requirements for investigative consumer reports (*Civ. Code, §§ 1786.12, 1786.16, 1786.40*), in addition to complying with requirements for consumer credit reports, absent any positive repugnancy between the two statutory schemes. (Opinion by Willhite, Acting P. J., with Manella and Collins, JJ., concurring.)

HEADNOTES [*527]

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Consumer and Borrower Protection Laws § 33--Investigative Consumer Reporting Agencies Act--Conditions Precedent to Preparation of Report.--The Investigative Consumer Reporting Agencies Act (*Civ. Code, § 1786 et seq.*) allows an investigative consumer reporting agency to furnish an investigative consumer report to a person it has reason to believe intends to use the information for employment purposes (*Civ. Code, § 1786.12, subd. (d)(1)*). However, if the report is sought for employment purposes other than suspicion of wrongdoing or misconduct by the subject of the investigation, the person seeking the investigative consumer report may procure the report, or cause the report to be made, only if the person procuring or causing the report to be made provides a clear and conspicuous disclosure in writing to the consumer at any time before the report is procured or caused to be made in a document that consists solely of certain specified disclosures and the consumer has authorized in writing the procurement of the report (*Civ. Code, § 1786.16, subd. (a)(2)*). In addition, the person procuring or causing the report to be

made must certify to the investigative consumer reporting agency that the person has made the applicable disclosures to the consumer required by *§ 1786.16, subd. (a)*, and that the person will comply with *§ 1786.16, subd. (b)* (*§ 1786.16, subd. (a)(4)*). *Section 1786.16, subd. (b)*, requires a person procuring or causing a report to be made to (1) provide the consumer a form with a box that can be checked if the consumer wishes to receive a copy of the report, and send a copy of the report to the consumer within three business days if the box is checked and (2) comply with *Civ. Code, § 1786.40*, if the person procuring or causing the report to be made contemplates taking adverse action against the consumer. *Section 1786.40* requires the user of an investigative consumer report who takes an adverse employment action against the consumer as a result of the report to so advise the consumer and supply the name and address of the investigative consumer reporting agency that furnished the report.

(2) Consumer and Borrower Protection Laws § 33--Consumer Credit Reporting Agencies Act--Overlap With Investigative Consumer Reporting Agencies Act.--Consumer reports that include character information obtained from a source other than personal interviews are governed by the Consumer Credit Reporting Agencies Act (*Civ. Code, § 1785.1 et seq.*), as long as the reports contain information bearing on a consumer's creditworthiness, credit standing, or credit capacity (*Civ. Code, § 1785.3, subd. (c)*). But they also are governed by the Investigative Consumer Reporting Agencies Act (*Civ. Code, § 1786 et seq.*) under its clear and unambiguous language. [*528]

(3) Statutes § 29--Construction--Language--Legislative Intent--Effectuating Purpose.--The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, the court turns first to the words of the statute. Where the language is clear, there can be no room for interpretation.

(4) Constitutional Law § 26--Constitutionality of Legislation--Fair and Reasonable Interpretation.--When the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution.

(5) Constitutional Law § 113--Constitutionality of Legislation--Vagueness--Overlapping Coverage of Statutes.--The fact that two acts overlap in their coverage does not render the acts unconstitutionally vague to the extent of that overlap. 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. When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Two statutes that overlap are given effect so long as each reaches some distinct cases.

(6) Consumer and Borrower Protection Laws § 33--Consumer Credit Reporting Agencies Act--Overlap With Investigative Consumer Reporting Agencies Act--Compliance With Each Act.--There is no positive repugnancy between the Consumer Credit Reporting Agencies Act (CCRAA) (*Civ. Code, § 1785.1 et seq.*) and the Investigative Consumer Reporting Agencies Act (ICRAA) (*Civ. Code, § 1786 et seq.*). An agency that furnishes a report containing both creditworthiness information and character information, and the person who procures or causes that report to be made, can comply with each act without violating the other. And despite the overlap between the CCRAA and the ICRAA, there remain certain consumer reports that are governed exclusively by the ICRAA (those with character information obtained from personal interviews) or by the CCRAA (those that include only specific credit information), because each act expressly excludes those specific reports governed by the other act (*Civ. Code, §§ 1785.3, subd. (c)(5), 1786.2, subd. (c)*). Therefore, courts can--and must--give effect to both acts.

(7) Consumer and Borrower Protection Laws § 33--Consumer Credit Reporting Agencies Act--Overlap With Investigative Consumer Reporting Agencies Act--Compliance With Each Act.--The Consumer [*529] Credit Reporting Agencies Act (CCRAA) (*Civ. Code, § 1785.1 et seq.*) does not specifically authorize anything. Rather, it imposes obligations upon consumer credit reporting agencies and users of consumer reports to the extent those reports include information bearing on a consumer's creditworthiness, credit standing, or credit capacity and are used as a factor in establishing the consumer's eligibility for credit, employment purposes, or hiring of a dwelling unit. By complying with those obligations, a consumer credit reporting agency or user of those consumer reports cannot be held liable under the CCRAA for actual or punitive damages suffered by the consumer. But compliance with the CCRAA does not absolve a user of a consumer report that includes the consumer's character information from liability if the user does not also comply with the obligations imposed by the Investigative Consumer Reporting Agencies Act (*Civ. Code, § 1786 et seq.*).

(8) Consumer and Borrower Protection Laws § 33--Consumer Credit Reporting Agencies Act--Overlap With Investigative Consumer Reporting Agencies Act--Compliance with Each Act.--To the extent that employee background checks included information related to employees' character, the employer was required to comply with the requirements set forth in the Investigative Consumer Reporting Agencies Act (*Civ. Code, § 1786 et seq.*), regardless of whether the employer complied with the Consumer Credit Reporting Agencies Act (*Civ. Code, § 1785.1 et seq.*).

[*Cal. Forms of Pleading and Practice (2015) ch. 129, Consumer Credit Reporting, § 129.19.*]

COUNSEL: Sundeen Salinas & Pyle, Hunter Pyle, Tanya Tambling; Lewis, Feinberg, Renaker, Lee & Jackson, Lewis, Feinberg, Lee & Jackson, Todd F. Jackson and Catha Worthman for Plaintiff and Appellant.

Littler Mendelson, Benjamin Emmert and Ronald A. Peters for Defendants and Respondents.

JUDGES: Opinion by Willhite, Acting P. J., with Manella and Collins, JJ., concurring.

OPINION BY: Willhite, Acting P. J.

OPINION

[*530]

WILLHITE, Acting P. J.--The Investigative Consumer Reporting Agencies Act (ICRAA) (*Civ. Code,*[1] *§ 1786 et seq.*) and the Consumer Credit Reporting Agencies Act (CCRAA) (*§ 1785.1 et seq.*) regulate agencies that gather information on consumers to provide to employers, landlords, and others for use by those persons in making employment, rental, and other decisions. The ICRAA governs agencies (and those to whom it provides information) with regard to investigative consumer reports, i.e., reports containing information on a consumer's character, general reputation, personal characteristics, or mode of living. The CCRAA governs agencies (and those to whom it provides information) with regard to consumer credit reports, i.e., reports of information bearing on a consumer's creditworthiness, [**2] credit standing, or credit capacity. Both acts impose obligations on the agencies regarding disclosure to consumers when the agencies furnish reports, and limit when and to whom those reports may be furnished. The obligations and limitations, however, are different for each act, as are the remedies for violations of the act; generally, the ICRAA imposes greater obligations and stricter limitations, and allows greater remedies.

1 Undesignated statutory references are to the Civil Code.

This appeal involves investigative consumer reports--background checks--made on employees of defendants First Student, Inc., and First Transit, Inc. (collectively, First), by defendants HireRight Solutions, Inc., and HireRight, Inc.[2] Plaintiff Eileen Connor's lawsuit against First alleging violations of the ICRAA was dismissed after the trial court granted First's motion for summary judgment based upon the holding of *Ortiz v. Lyon Management Group, Inc. (2007) 157 Cal.App.4th 604 [69 Cal. Rptr. 3d 66]* (*Ortiz*). In *Ortiz*, the appellate court held that the ICRAA was unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information because unlawful detainer information relates to both creditworthiness and character. In the *Ortiz* court's view, the ICRAA [**3] and the CCRAA present a statutory scheme that requires information in consumer reports to be categorized as *either* character information (governed by the ICRAA) *or* creditworthiness information (governed by the CCRAA); when the information can be categorized as both, the statutory scheme cannot be constitutionally enforced because it does not give adequate notice of which act governs that information.

2 HireRight Solutions, Inc., was formerly known as USIS Commercial Services, Inc. In 2009, USIS was rebranded as HireRight Solutions, Inc.; for ease of reference, we refer to USIS, HireRight Solutions, Inc., and HireRight, Inc., collectively as HireRight. All of the background checks at issue in this lawsuit were conducted by one or more of those entities.

We disagree with the analysis in *Ortiz, supra, 157 Cal.App.4th 604*. There is nothing in either the ICRAA or the CCRAA that precludes application of [*531] *both* acts to information that relates to both character and creditworthiness. Therefore, we conclude the ICRAA is not unconstitutionally vague as applied to such information. Accordingly, we reverse the summary judgment.

BACKGROUND

Because the only issue in this appeal is whether the ICRAA as applied to the background checks conducted [**4] on First's employees is unconstitutionally vague, our discussion of the facts is limited to those facts necessary to an understanding of that issue. Those facts are for the most part undisputed.

Connor worked as a school bus driver. Before October 2007, when Laidlaw Education Services was acquired by First, Connor worked for Laidlaw; she became an employee of First after the acquisition.

In October 2007, after First acquired Laidlaw, First hired HireRight to conduct background checks on Connor and all other former Laidlaw school bus drivers and aides. Additional background checks were conducted in 2009 and 2010. As part of the background checks, HireRight provided First with reports that included information from criminal record checks and searches of sex offender registries, as well as the subject's address history, driving records, and employment history.

Before conducting the background checks, First sent to each employee a "Safety Packet." The Safety Packet was a booklet that included a notice that "an investigative consumer report" may be requested by HireRight. The notice stated that the report "may include ... names and dates of previous employers, reason for termination of employment, [**5] work experience, accidents, 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." The notice informed the employee that he or she may view the file maintained on him or her, receive a summary of the file by telephone, or obtain a copy of the file. The notice also included a box the employee could check if he or she wanted to receive a copy of the report.[3] Finally, the notice included an authorization and release that released First and HireRight from all claims and damages arising out of or relating to the investigation of the employee's background.

3 This check-off box was contained in a section entitled "Notice to California Applicants," which set forth the applicant's rights under the ICRAA, and specifically referred to *section 1786.22*, part of the act.

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In her lawsuit,[4] Connor alleges that the notice did not satisfy the specific requirements of the ICRAA, and that First did not obtain her written authorization. First moved for summary judgment on the ground that the ICRAA is unconstitutionally vague as applied to Connor's claims [**6] that First violated the statute. In granting the motion based upon *Ortiz, supra, 157 Cal.App.4th 604*, the trial court observed that, notwithstanding plaintiffs' criticisms of the *Ortiz* court's reasoning, "[a] trial court must accept appellate decisions as they are written." Noting that two federal district courts have followed and extended *Ortiz*, and no court has criticized or departed from it, the trial court concluded that its "job is straightforward: apply *Ortiz*, fully and faithfully." The court dismissed Connor's claims and entered judgment in favor of First. Connor timely filed a notice of appeal from the judgment.

4 Connor is one of more than 1,200 plaintiffs in several lawsuits filed against First and HireRight that were coordinated by the Los Angeles Superior Court under *rule 3.550 of the California Rules of Court*. The operative complaint for all of the plaintiffs is the consolidated fourth amended complaint. Connor and another plaintiff, Jose Gonzalez, were selected as bellwether plaintiffs. First filed a motion for summary judgment against Connor, and HireRight filed a motion for summary judgment against Gonzalez. The motions were heard together, and the trial court granted both on the same ground. Connor and Gonzales each filed a notice of appeal [**7] from the judgment entered against him or her, and each appeal was assigned a different case number. We granted the parties' request to consolidate the appeals. Sometime after Connor and Gonzalez filed their joint appellants' opening brief, HireRight filed a petition for bankruptcy, and the appeal was stayed as to HireRight (and Gonzalez, against whom HireRight had obtained the judgment on appeal). Therefore, we vacate our order consolidating Gonzalez's appeal with Connor's appeal. This opinion addresses only First's judgment against Connor.

DISCUSSION

Connor contends that under its plain language, the ICRAA applies to the background checks at issue in this case, and the fact that the CCRAA might also apply to those same background checks does not render the ICRAA void for vagueness. She argues that *Ortiz* was wrongly decided because it failed to consider case law governing the interpretation of overlapping statutes. We agree.

A. *The Background Checks Are Subject to the ICRAA Under Its Unambiguous Language*

The ICRAA provides that "[a]n investigative consumer reporting agency" may furnish an "investigative consumer report" to another person only under certain limited circumstances. (*§ 1786.12.*) It defines the term "investigative consumer report" as "a consumer report in which [**8] information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means. The term does not include a consumer report [*533] or other compilation of information that is limited to specific factual information relating to a consumer's credit record or manner of obtaining credit obtained directly from a creditor of the consumer or from a consumer reporting agency when that information was obtained directly from a potential or existing creditor of the consumer or from the consumer."

(*§ 1786.2, subd. (c).*) It defines "investigative consumer reporting agency" as "any person who, for monetary fees or dues, engages in whole or in part in the practice of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning consumers for the purposes of furnishing investigative consumer reports to third parties," with exceptions not relevant here. (*§ 1786.2, subd. (d).*)

(1) The ICRAA allows an investigative consumer reporting agency to furnish an investigative consumer report to a person it has reason to believe "[i]ntends to use the information for employment purposes."[5] (*§ 1786.12, subd. (d)(1).*) However, if the report "is sought for employment purposes other [**9] than suspicion of wrongdoing or misconduct by the subject of the investigation, the person seeking the investigative consumer report may procure the report, or cause the report to be made, only if ... [¶] ... [¶] ... [t]he person procuring or causing the report to be made provides a clear and conspicuous disclosure in writing to the consumer at any time before the report is procured or caused to be made in a document that consists solely of [certain specified disclosures] ... [¶] ... [¶] ... [and] [t]he consumer has authorized in writing the procurement of the report." (*§ 1786.16, subd. (a)(2).*) In addition, the person procuring or causing the report to be made must "certify to the investigative consumer reporting agency that the person has made the applicable disclosures to the consumer required by [*section 1786.16, subdivision (a)*] and that the person will comply with *subdivision (b)*." (*§ 1786.16, subd. (a)(4).*) *Subdivision (b) of section 1786.16* requires the person procuring or causing the report to be made to (1) provide the consumer a form with a box that can be checked if the consumer wishes to receive a copy of the report, and send a copy of the report to the consumer within three business days if the box is checked and (2) comply with *section 1786.40* if the person procuring or causing the report to be made contemplates taking adverse [**10] action against the consumer. (*§ 1786.16, subd. (b).*) *Section 1786.40* requires the user of an investigative consumer report who takes an adverse employment action against the consumer as a result of the report to so advise the consumer and supply the name and address of the investigative consumer reporting agency that furnished the report.

5 The ICRAA defines the term "employment purposes" when used in connection with an investigative consumer report as "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee." (*§ 1786.2, subd. (f).*)

[*534]

In this case, First admits that the background checks it requested HireRight to prepare included reports containing information regarding the subject's criminal records, sex offender status, address history, driving records, and employment history. First also admits that those background checks were used to confirm that Connor and the other employees "are properly qualified to safely perform their job duties."

There is no question that the background checks included information on the employees' (or prospective employees') "character, general reputation, personal characteristics, or mode of living," and thus were investigative consumer reports [**11] under *section 1786.2, subdivision (c)*. Nor is there any question that the investigative consumer reports were used for employment purposes, as defined in *section 1786.2, subdivision (f)*. Therefore, under the plain statutory language, HireRight, as an investigative consumer reporting agency, and First, as a person who procured or caused the investigative consumer reports to be made, were required to comply with the applicable provisions of the ICRAA.

B. *The Possible Applicability of the CCRAA Does Not Render the ICRAA Unconstitutionally Vague*

Despite the unambiguous language of the ICRAA, First argues the act is unconstitutionally vague because (1) the CCRAA also applies to the background checks at issue, and a person of ordinary intelligence cannot determine whether the CCRAA or the ICRAA applies, and (2) it potentially makes a defendant liable even though the conduct at issue "is specifically authorized by the CCRAA." There are two problems with these arguments.

Initially, it is not entirely clear that the CCRAA applies to the background checks at issue here. The CCRAA applies to "consumer credit reports," which the act defines as "any written, oral, or other communication of any information by a consumer credit reporting agency *bearing on a consumer's* [**12] *credit worthiness, credit standing, or credit capacity*, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for: (1) credit to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) hiring of a dwelling unit, as defined in *subdivision (c) of Section 1940*, or (4) other purposes authorized in *Section 1785.11*." (*§ 1785.3, subd. (c)*, italics added.) The definition specifically excludes "any report 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 [*535] whom he is acquainted or who may have knowledge concerning those items of information." (*Ibid.*)

Although First produced undisputed evidence that the background checks at issue did not contain any character information obtained through personal interviews (which would have made them subject to the CCRAA exclusion), there is no evidence that the background checks sought or included information bearing on the subjects' creditworthiness, credit standing, or credit capacity. [**13] Indeed, the notice First sent to the subjects of the background checks referred to the checks as "investigative consumer report[s]"--*not* consumer credit reports--and listed the kind of information sought, which did not specifically include credit information (although it did include "any other information about you which may reflect upon your potential for employment").

Second, even if we assume the CCRAA applied to the background checks, First's vagueness arguments are based upon the faulty premises that (1) any given consumer report must be governed by either the CCRAA or the ICRAA, but not both, and (2) the CCRAA "authorizes" certain conduct.

1. *Neither the Language nor the History of the CCRAA and the ICRAA Support First's Argument, and the* Ortiz *Court's Conclusion, That a Consumer Report Could Not Be Subject to Both Acts as Currently Written*

First's first vagueness argument closely follows the analysis by the appellate court in *Ortiz, supra, 157 Cal.App.4th 604*. In *Ortiz*, the plaintiff applied to rent an apartment managed by the defendant. The plaintiff gave written consent to the defendant to obtain a tenant screening report, which specifically included "an 'unlawful detainer (eviction) search.'" (*Id. at p. 611.*) Although [**14] that search indicated that no such actions had been filed against the plaintiff, and the plaintiff's application was approved, the plaintiff nevertheless filed a lawsuit against the defendant alleging that the defendant violated the ICRAA because the results of the unlawful detainer search constituted character information and the defendant failed to give her a written notice and form with a check box to request the report. (*157 Cal.App.4th at p. 611.*) The trial court granted the defendant's summary judgment motion, finding that the tenant screening report contained no character information subject to the ICRAA. The court noted that there were no unlawful detainer actions listed in the report, but it found that even if there had been unlawful detainer information, that would not prove that plaintiff had a bad character. The trial [*536] court also held that the plaintiff's broad reading of the ICRAA would render the act unconstitutionally vague and inconsistent with federal law. (*157 Cal.App.4th at p. 612.*)

In its opinion affirming the judgment, the appellate court viewed the issue before it as "a categorization challenge." (*Ortiz, supra, 157 Cal.App.4th at p. 612.*) It noted that "[w]hether an unlawful detainer action has been filed against a consumer appears to speak to both creditworthiness [**15] and character." (*Ibid.*) It explained that the categorization challenge "arises not because unlawful detainer information is somehow paradoxical, but because the statutory scheme fails to set forth truly distinct categories. It presents a false dichotomy between creditworthiness and character." (*Id. at pp. 612-613.*)

The *Ortiz* court's analysis (like First's) is premised upon its determination that a consumer report cannot be subject to both the ICRAA and the CCRAA. The *Ortiz* court did not point to any language in either act that precludes the application of both to the same consumer report. Instead, the court (like First) relied upon the history of the acts to support its determination.

As the *Ortiz* court noted, the CCRAA and the ICRAA were enacted in 1975, and were modeled after the federal Fair Credit Reporting Act (FCRA) (*15 U.S.C. § 1681 et seq.*). (*Ortiz, supra, 157 Cal.App.4th at p. 613.*) Unlike the FCRA--which governs all consumer reports, regardless whether the reports contain only creditworthiness information, only character information, or both (although it treats differently reports that contain character information that was obtained from personal interviews)--the California Legislature created two separate statutory schemes, one governing consumer [**16] credit reports (the CCRAA) and the other governing investigative consumer reports (the ICRAA). As originally enacted, the scope of the ICRAA was limited to consumer reports containing character information when that information was obtained from personal interviews, and the CCRAA specifically excluded such reports from its scope; the ICRAA, in turn, specifically excluded reports that included only credit information.[6] (*Ortiz, supra, 157 Cal.App.4th at pp. 613-616.*)

> 6 In the original enactment in 1975, the ICRAA defined the term "investigative consumer report" as "a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living 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 any such items of information. Such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer." (Former *§ 1786.2, subd. (c)*, added by Stats. 1975, ch. 1272, p. 3378.) The

> [**17] definition of the term "consumer credit report" in the 1975 version of the CCRAA provided that "[t]he term does not include: ... (4) any report 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 any such items of information." (Former *§ 1785.3, subd. (c)*, added by Stats. 1975, ch. 1271, pp. 3369-3370.)

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The *Ortiz* court pointed to this history to confirm its conclusion that, by enacting "two separate statutes governing two kinds of [consumer reports] depending on the type of information they contain ... [the Legislature] inten[ded] to distinguish between creditworthiness information and character information." (*Ortiz, supra, 157 Cal.App.4th at p. 614.*) From this, the court reasoned that any one item of information must be classified as *either* creditworthiness *or* character information, but not both, because a single report could be governed by *either* the CCRAA *or* the ICRAA, but not both. (*Ortiz, supra, 157 Cal.App.4th at pp. 614-616.*) But the history does not, in fact, support the court's conclusion.

The *Ortiz* court and First are correct that under [**18] the CCRAA and the ICRAA as originally enacted, a consumer report could not be governed by both the CCRAA and the ICRAA. But the reason for that was not because information could not be classified as both creditworthiness information and character information. It was because the ICRAA governed only those consumer reports that included character information *obtained through personal interviews*, and the CCRAA expressly excluded such reports. But it is clear that the CCRAA always governed consumer reports that included character information, as long as that information was not obtained through personal interviews. For example, the CCRAA has always included provisions that limited the inclusion of information regarding criminal records that antedated the report by more than seven years. (See *§ 1785.13, subd. (a)(6)*, added by Stats. 1975, ch. 1271, pp. 3369, 3372.) Similarly, it has always imposed certain requirements when a credit report contained information from public records that were likely to have an adverse effect on a consumer's ability to obtain employment, and expressly referred to public records "relating to arrests, indictments, [and] convictions." (See *§ 1785.18, subd. (b)*, added by Stats. 1975, ch. 1271, pp. [**19] 3369, 3375.)

(2) When the Legislature amended the ICRAA in 1998 to remove the limitation on the scope of the ICRAA so it would govern all consumer reports that include character information, no matter how that information is obtained, it did not amend the CCRAA to exclude from its scope reports that include character information obtained from sources other than personal interviews. Thus, after the amendment, consumer reports that include character information obtained from a source other than personal interviews continue to be governed by the CCRAA, as long as the reports contain information "bearing on a consumer's credit worthiness, credit standing, or [*538] credit capacity." (*§ 1785.3, subd. (c).*) But they *also* are governed by the ICRAA under its clear and unambiguous language.

(3) The *Ortiz* court's statement (upon which First relies) that a consumer report cannot be subject to both acts (*Ortiz, supra, 157 Cal.App.4th at p. 617*) simply is not supported by the language of the acts as now amended. """The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.]'" In determining such intent, the court turns first to the words of the statute. "[W]here ... the [**20] language is clear, there can be no room for interpretation.'" [Citation.]" (*Walker v. Superior Court (1988) 47 Cal.3d 112, 121 [253 Cal. Rptr. 1, 763 P.2d 852]*; see *Connecticut Nat. Bank v. Germain (1992) 503 U.S. 249, 253-254 [117 L. Ed. 2d 391, 112 S. Ct. 1146]* ["courts must presume that a legislature says in a statute what it means and means in a statute what it says there"].) **(4)** And when "'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution.'" (*San Francisco Unified School Dist. v. Johnson (1971) 3 Cal.3d 937, 948 [92 Cal. Rptr. 309, 479 P.2d 669].*) **(5)** The fact that the two acts overlap in their coverage of some consumer reports does not render the acts unconstitutionally vague to the extent of that overlap. "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between the two laws, [citation], a court must give effect to both." (*Connecticut Nat. Bank v. Germain, supra, 503 U.S. at p. 253.*) As the Supreme Court observed in a case in which the defendant argued that the Court should not give effect to two patent laws, each with different requirements and protections, that protect the same thing, "'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' ... [¶] ... [T]his Court [**21] has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." (*J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc. (2001) 534 U.S. 124, 143-144 [151 L. Ed. 2d 508, 122 S. Ct. 593].*)

(6) In the present case, there is no "positive repugnancy" between the CCRAA and the ICRAA. An agency that furnishes a report containing both creditworthiness information and character information, and the person who procures or causes that report to be made, can comply with each act without violating the other. And despite the overlap between the CCRAA and the ICRAA after the 1998 amendment, there remain certain consumer reports that are governed exclusively by the ICRAA (those with character information obtained from personal interviews) or by the CCRAA (those that include only [*539] specific credit information), because each act expressly excludes those specific reports governed by the other act. (See *§§ 1785.3, subd. (c)(5)* [excluding from the CCRAA "any report 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"], *1786.2,* [**22] *subd. (c)* [excluding from the ICRAA "a consumer report or other compilation of information that is limited to specific factual information relating to a consumer's credit record or manner of obtaining credit obtained directly from a creditor of the consumer or from a consumer reporting agency when that information was obtained directly from a potential or existing creditor of the consumer or from the consumer"].) Therefore, we can--and must--give effect to both acts. By doing so, the constitutional vagueness issue identified in *Ortiz, supra, 157 Cal.App.4th 604*, and relied upon by First, disappears because there is no question that the information First requested in the background checks included information on the employees' character, general reputation, personal characteristics, or mode of living, that is, information covered by the plain language of the ICRAA.

2. *First's Conduct Was Not "Specifically Authorized" by the CCRAA*

(7) First's argument that the ICRAA is unconstitutionally vague as applied to this case because it could hold First liable for violating its provisions even though the conduct at issue "is specifically authorized by the CCRAA" rests on another faulty premise. The CCRAA does not "specifically authorize" [**23] anything. Rather, it imposes obligations upon consumer credit reporting agencies and users of consumer reports to the extent those reports include information bearing on a consumer's creditworthiness, credit standing, or credit capacity and are used as a factor in establishing the consumer's eligibility for credit, employment purposes, or hiring of a dwelling unit. By complying with those obligations, a consumer credit reporting agency or user of those consumer reports cannot be held liable *under the CCRAA* for actual or punitive damages suffered by the consumer. But compliance with the CCRAA does not absolve a user of a consumer report that includes the consumer's character information from liability if the user does not also comply with the obligations imposed by the ICRAA.

(8) In short, 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 whether First complied with the CCRAA. [*540]

DISPOSITION

The judgment is reversed. Connor shall recover her costs on appeal.

Manella, J., and Collins, J., concurred.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 50 W. San Fernando, 15th Floor, San Jose, California 95113.2303. On September 21, 2015, I served the within document(s):

PETITION FOR REVIEW

X by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

X by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

SENT VIA OVERNIGHT MAIL
Clerk of the Court of Appeals
Second Appellate District, Division 4
300 South Spring Street, 2nd Floor,
North Tower
Los Angeles, CA 90013

SENT VIA PERSONAL DELIVERY
COUNTY LEGAL
Hunter Pyle, Esq.
Sundeen, Salinas & Pyle
428 13th Street, 8th Floor
Oakland, CA 94612

SENT VIA OVERNIGHT MAIL
Los Angeles County Superior Court
600 Commonwealth Ave.
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SENT VIA OVERNIGHT MAIL
Todd F. Jackson, Esq.
Catha Worthman, Esq.
Lewis, Feinberg, Lee, Renaker & Jackson, P.C.
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Oakland, CA 94607

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare that I am employed in the office of a member of the bar of this court

at whose direction the service was made.

Executed on September 21, 2015, at San Jose, California.

Pauline R. Lopez

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