Supreme Court Case No.: S229428

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

FIRST STUDENT, INC. AND FIRST TRANSIT, INC.'S CONSOLIDATED ANSWER TO BRIEFS OF *AMICUS CURIAE,* A NEW WAY OF LIFE REENTRY PROJECT, ET AL. AND STATE ATTORNEY GENERAL

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I.

INTRODUCTION

The briefing of the Amicus Curiae speaks at length of the importance of protecting consumers from errors potentially contained in an investigative consumer report. However, they do not adequately address the primary issue in this matter which is: Can the two statutes be reconciled in a way that does not render statutory language of one or both superfluous and contradictory and therefore unconstitutionally vague?

It is important to remember that our constitutional standards governing clarity do not only protect employers, landlords, or corporations, but individuals as well. We should not blithely disregard the Legislature's failure in this matter simply because we believe the particular persons involved **this time** are somehow more worthy of protection generally. It is important to remember that many of the cases cited by Respondents in this case involve individual plaintiffs and criminal defendants who were seeking to escape the often drastic consequences of laws, which were not to them sufficiently or sensibly drafted.

The Amicus Curiae address themselves at length to the real world context of prospective employees or other covered consumers who suffer because of errors in their consumer reports. Given that context is important, it is also important that we remember that the school children under the care of Defendant-Respondent, First Student, are also deserving of protection. The tone of the Plaintiff/Appellant and the Amicus Curiae imply that employers and consumer reporting agencies conduct background check solely for their own pecuniary or business related interests. This is almost never the case. In this case, First Student was charged with protecting our most precious cargo, our children. First Student does not conduct background checks for purely practical or financial reasons. First Student conducts background checks to insure that when our children are in First Student's sole custody and care, they are as safe and secure as humanly possible. It cannot be disputed that First Student could not have met their

obligations to protect our children if they were not permitted to conduct the background checks in the manner in which they did, which was in compliance with CCRAA.

In this context "positive repugnancy" seems too lenient a standard unless the two statutes can in fact be reconciled in some fashion. Here they cannot. If you accept, as all parties to his matter seem to, that the statutes overlap, then you cannot reconcile these statutes without rendering a large part of the Consumer Credit Reporting Agencies Act (the "CCRAA") superfluous and irrelevant.

It bears repeating that for 25 years, these statutes as originally conceived, and subsequently interpreted, were intended to be separate and distinct and the CCRAA and not the Investigative Consumer Reporting Agencies Act (the "ICRAA"), was the primary vehicle for employers to conduct employment related background checks. Indeed, during this time the ICRAA was only implicated if an employment related background check involved personal interviews. This changed with the ICRAA's 1998 amendment. However, there is no reliable evidence or facts which support a claim that ICRAA's amendment was intended by the Legislature to supplant the CCRAA as it relates to the conduct of employment related background checks.

Finding First Student violated the ICRAA when it requested the subject consumer reports in compliance with the CCRAA would not only violate the constitutional due process requirement, it would also violate the well-established cannon of statutory construction – that statutes are to be interpreted in a manner to avoid "render[ing] one or the other wholly superfluous." *Connecticut National Bank v. Germain* (1992) 503 U.S. 249, 253. Interpreting the ICRAA as it existed at the time First Student procured or caused to be prepared the subject consumer reports, would render the CCRAA "superfluous" as to those reports that are simultaneously subject to both. No one can argue otherwise.

Moreover, at the time First Student obtained the consumer reports, the decision in *Ortiz* had been in place for more than two years. There was no other judicial interpretation that addressed this issue. Therefore, the only existing judicial interpretation of this issue at the time First Student obtained the subject consumer reports was that ICRAA, as applied to such consumer reports, was unconstitutionally vague. It therefore seems counterintuitive to suggest that First Student could not fulfill its legal obligation to these consumers by complying with the CCRAA, as it was the only applicable statute, at that time that had not been deemed unconstitutionally vague.

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

II.

ARGUMENT

A. The ICRAA Is Unconstitutionally Vague "As Applied"

Ortiz and its progeny compel dismissal of Plaintiffs' claims because consumer reports obtained by First Student regarding Plaintiff contained information that can be classified *both* as "character" *and* "creditworthiness" information.

1. In 1975, The Legislature Established The ICRAA And The CCRAA As Independent Statutes

Amicus Curiae largely repeat the arguments of Plaintiff Respondent as to whether the ICRAA is unconstitutionally vague. Without repeating these arguments First Student respectfully submits that it has established a vagueness defense to Plaintiff's claims.

The text and legislative history of the statutes confirm the *Ortiz* court's conclusion that "any one item of information may be classified as either creditworthiness or character, *but not both*, Ortiz, 157 Cal. App. 4th at 615 (emphasis added).

In 1975, the Legislature responded to passage of the federal Fair Credit reporting Act ("FCRA") by repealing the state's first consumer credit reporting law, the Consumer Credit Reporting Act, and passing the ICRAA and the CCRAA. Whereas the FCRA defined an "investigative consumer report" as a type of "consumer report" (15 U.SC. § 1681a(e)), the ICRAA was established to independently govern only investigative consumer reports (i.e. screening reports compiled based on information from personal interviews). And, whereas the FCRA's definition of a "consumer report" encompassed information bearing on any of the even specified factors (i.e., credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living), the CCRAA was established to *independently* govern the first three factors (credit worthiness, credit standing and credit capacity) and the ICRAA was established to *independently* govern the other four factors (character, reputation, personal characteristics and mode of living).

As enacted by Assembly Bill 601, the ICRAA defined an "investigative consumer report" as one "in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews," and *excluded*, from its coverage reports containing character information obtained through personal interviews.

The legislature ultimately rejected one combined statute in favor of two *separate statutes*. The Legislature modeled Assembly Bills 600 and 601 after an *unsuccessful* bill from the prior year, Assembly Bill 4494, which had proposed enacting a *single statute* similar to the FCRA (i.e., governing "consumer reports" rather than "consumer credit reports" and separately "investigative consumer reports").

The structure and history of the ICRAA and the CCRAA squarely support Justice Ikola's reasoning in *Ortiz*. On the other hand, nothing in the text of the statutes or the legislative history supports Plaintiff or Amicus Curiae's argument that the Legislature only intended "limited areas of exclusivity."

Similarly Plaintiffs and "Amicus Curiae are wrong that the Legislature intended to rewrite the statutory scheme when it amended the ICRAA in 1998. Neither Plaintiff, nor the Amicus Curiae cite to any authority or evidence to counter Justice Ikola's observation that:

Nothing suggests the 1998 amendment did anything more than expand the means by which character information subject to the ICRAA may be obtained. Nothing suggests the amendment eliminated the statutory distinction between creditworthiness and character information or permitted any one item of information to make a report subject to both the CCRAA and the ICRAA. As the Legislative Counsel's Digest notes, the 1998 amendment simply "redefine[s] and investigative consumer report in which specified consumer information is obtained by any means. *Ortiz*, 157 Cal. App. 4th at 617 fn. 9. *Cf. Jones v. The Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158, 1169-1170 (2008) ("unlikely" the Legislature would make a significant change in the FEHA "without so much as a passing reference [in the legislative history] to what it was doing").

Plaintiffs and Amicus Curiae also ignore evidence in the legislative history that contradicts their argument, for example, the letter to Governor Wilson from Senator Tim Leslie, the author of the 1998 Amendment, which explained the purpose of the amendment was to bring the ICRAA into *parity with* the CCRAA in various ways. *See*, Ltr. to Gov. Wilson from Sen. Leslie (Sept. 8, 1998), at p. 1 ("This measure is intended to strengthen disclosure requirements for investigative consumer reports *similar to* what already exists today for consumer credit reports.") (emphasis added). See Also Sen. Judiciary Comm. Analysis (May 6, 1998), at p. 7 (stating: "This bill is consistent [sic] with the related state and

federal consumer credit acts") (emphasis added), and Ltr. To Gov. Wilson from Sen. Leslie, at p. 2 ("My assertion throughout SB 1454's legislative journey was that this measure's definition of an investigative consumer report *does not expand itself or deviate* from what is already applicable under current state law.")

Plaintiff and Amicus Curiae also put the "cart before the horse" when they argue that the terms of the ICRAA itself are not vague. Each that has considered this question has ruled that the lack of fair notice results from uncertainty about whether the ICRAA or the CCRAA *apply in the first instance.*[1]

In short, the Plaintiffs and Amicus Curiae's claim of "error" is unsupported.

2. Cases Cited By Amicus Curiae Are, As They Were With Plaintiff, Inapposite.

To support their argument that Judge Ikola "erred" in *Ortiz* Amicus Curiae cite to the same handful of cases discussing overlapping statutes that were also cited by Plaintiffs. These cases are easily distinguishable because they involve either complementary statutes or the court's reluctance to read an exception into a generally-applicable statute by negative inference.

For instance, in *Sanchez v Swissport*, 213 Cal. App. 1331 (2013), cited at page 17, the court held that, for pleadings purposes, the pregnancy-disabled plaintiff had a right to job protected medical leave under the state Pregnancy Disability Leave Law ("PDLL") and separately under the state Fair Employment and Housing Act ("FEHA"). Whereas the ICRAA and CCRAA are deliberately mutually exclusive, the PDLL states outright that it provides remedies "in addition to" the FEHA. *Id.* at 1338-1339 (citing Gov't Code §§ 12945(a), (b)). Though Plaintiffs may wish otherwise, the ICRAA does not state that it provides right "in addition to" the CCRAA, but only that it does not "affect the right of any

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[1] *Ortiz*, 157 Cal. App. 4th 619; *Trujillo*, 157 Cal. App. 4th at 640; Roe v Lexis/Nexis Risk Solutions, Inc., 2013 U.S. Dist. LEXIS 88936, at *17-18 (C.D. Cal. March 19, 2013): Moran v. The Screening Pros, 2012 U.S. Dist. LEXIS 158598, at *20-22 (C.D. Cal. Sept. 28, 2012)

consumer to maintain an action ... for invasion of privacy or defamation." Civ. Code § 1785.32 (The CCRAA *preempts* these same tort claims).

Natural Resources Defense Council v. Arcata Nat'l Corp., 59 Cal. App. 3d 959 (1976) cited at page 16, also did not involve mutually exclusive statutes. The issue was whether an environmental impact report was required for planned timber harvesting. The Defendant timber companies argued against such a requirement because it was not mentioned in the state Forest Practice Act, but only in the more general state Environmental Quality Act. In rejecting this argument, the court refused to construe the mere "silence" in the one act as creating an implied exception in the other. *Id.* at 965. The Case is inapposite because the mutual exclusions in the CCRAA and ICRAA are explicit, not implied. Civ. Code §§ 1785.3(c) and 1786.2(c).

Powell v. United States Cartridge, 339 U.S. 497 (1950), cited at pages 15 and 16 of Amicus Curiae's brief, is also inapposite. The Court held that federal contractors must comply with both the wage payment statute applicable to such contractors (the Walsh-Healey act) and the later-enacted general wage payment statute, the Fair Labor Standards Act or "FLSA" based on "affirmative statements" in the text of the FLSA showing the Congress so intended. *Id.* at 515-520.

3. The ICRAA Therefore Is Unconstitutionally Vague "As Applied" To The Subject Consumer Reports Regarding Plaintiffs For First Student

To ensure the safety and welfare of its passengers, First Student arranged to screen its bus drivers, starting with the yellow school bus drivers from Laidlaw. For each Plaintiff, HireRight Solutions delivered to First Student one or more employment screening reports containing information (*e.g.*, criminal records) that can be classified as *either* character *or* creditworthiness information. *Ortiz* and its progeny hold that the ICRAA is unconstitutionally vague "as applied" to such reports.

Plaintiff-Appellants and Amicus Curiae seem to concede that they cannot distinguish *Ortiz* because it involved *tenant* screening reports because the court declared: "Our discussion is *not* limited to reports used to screen tenants . . . as reports subject to [the ICRAA and CCRAA] may be used for other purposes." *Ortiz*, 157 Cal. App. 4th at 617 n. 2 (emphasis added); *see also* Civ. Code §§ 1785.11, 1785.13, 1786.12, 1786.18 (provisions in the ICRAA and CCRAA governing employment screening reports). That *Ortiz* involved *unlawful detainer* records is also immaterial. *Moran* and *Roe* extended *Ortiz* to *criminal* records, and the analysis by Judge Wilson and Judge Feess is clear and convincing.

It is also immaterial that some screening reports containing criminal records and driving records, verification of prior employment ("employment history records"), Social Security number verification, and/or drug and/or alcohol testing results. The text of the ICRAA and CCRAA acknowledges the *broad* range of information that may bear on a consumer's character and creditworthiness. Thus, both statutes restrict the reporting of enumerated items of outdated information (*e.g.*, outdated arrest records) and also "**any other [outdated] adverse information**." Civ. Code §§ 1785.13(a)(7), 1785.14(a), 1786.18(a)(8), 1786.20(a) (emphasis added). Also, to the extent that any of these items of information were *sub-components* of a *single* report for First Student, Plaintiffs cannot parse them from the criminal record sub-component of each report. It would be absurd to find that the ICRAA was vague "as applied" only to some components of a single multi-component report.

Moreover, all of these items of information, like unlawful detainer records and criminal records, equally can be classified as *either* character or creditworthiness information. Each item of information may bear on whether the consumer is stable, reliable, honest, trustworthy, etc. For example, driving records can contain criminal records (*e.g.*, DUIs), drug testing results can reveal criminal behavior (*i.e.*, illegal drug use), and Social Security number verifications can

reveal identity fraud. *Cf. Hodge v. Texaco*, 975 F.2d 1093, 1095-96 (5th Cir. 1992) (FCRA case discussing driving records and drug test result reports).

Plaintiff-Appellants also cannot evade *Ortiz* based on the exclusion in the CCRAA's definition of a "consumer credit report" for character information "obtained through personal interviews."[2] Civ. Code § 1785.3(c). CRA's like HireRight Solutions sometimes obtain information for employment history records directly from the consumer's self-reported prior employers. As a factual matter, HireRight Solutions did *not* obtain such information directly from any of the Plaintiffs' prior employers. Furthermore, the reference to "personal interviews" in the CCRAA's exclusion does not solve for the uncertainty created by the 1998 amendment to the ICRAA's definition of an "investigative consumer report." The CCRAA's exclusion relies on the same unconstitutional character-creditworthiness distinction. In fact, by its terms, the CCRAA's exclusion only extends to a report containing information "solely" on a consumer's character. Civ. Code § 1785.3(c). Accordingly, even a report containing information obtained by personal interviews can be subject to *either* the ICRAA *or* the CCRAA where, as here, the information bears on the consumer's character *and* creditworthiness.

Finally, at the time First Student obtained the consumer reports that are the subject of this action, the decision in *Ortiz* had been in place for more than two years. The Legislature could have, but chose not to, address this issue, but simply allowed the judicial determination that the ICRAA was unconstitutionally vague to stand. While subsequent legislation in 2012 may have indirectly addressed the overlap issue, there was no other judicial interpretation or legislative action that directly addressed this issue. Indeed, it is significant that this court declined to review the decision in *Ortiz*, further solidifying it as solid law until the present time. Therefore, the only existing judicial interpretation of this issue at the

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[2] The Legislature did *not* amend this exclusion in the CCRAA when it amended the ICRAA's definition of an "investigative consumer report" in 1998.

time First Student obtained the subject reports was that ICRAA, as applied to such consumer reports, was unconstitutionally vague. It therefore seems counterintuitive to suggest that First Student could not fulfill its legal obligation to these consumers by complying with the CCRAA, as it was the only applicable statute, in place that had not been deemed unconstitutionally vague.

III.

CONCLUSION

As First Student established in its Opening and Reply briefs and above, it complied with the CCRAA when it requested the subject background reports on Ms. Connor. At the time it did, the CCRAA and the ICRAA did not provide any notice that First Student was required, or potentially required, to comply with the ICRAA. Ms. Connor's attempt to hold First Student liable under the ICRAA for engaging in such legal conduct shows the ICRAA is unconstitutionally vague as applied to this action. This Court should therefore reverse the decision of the Second District Court of Appeal.

Dated: June 3, 2016

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CERTIFICATE OF WORD COUNT

Pursuant to CRC 8.204(c) and 8.486(a)(6), the text of this Opening Brief, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and this certificate, consists of 3,170 words in 13-point Times New Roman type as counted by the word-processing program to generate the text.

Dated: June 3, 2016

LITTLER MENDELSON, PC

By: _____

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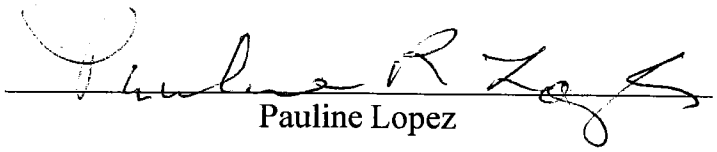

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