Case No.: S229428

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EILEEN CONNOR,

Plaintiff and Appellant,

v.

FIRST STUDENT, INC., et al.,

Defendants and Respondents

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

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

APPELLANT EILEEN CONNOR'S ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

It is well-settled that where two statutes act on the same subject, they must both be given effect, except in the rare circumstance—not present here—where it is impossible to comply with both.[1] In other words, so long as there is no "positive repugnancy" between two overlapping laws, courts should apply the higher requirement of the two as satisfying both. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992); *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519 (1950).

Here, the Consumer Data Industry Association ("CDIA") either concedes or does not contest the core points made by Appellant Eileen Connor in her brief: that the Investigative Consumer Reporting Agencies Act ("ICRAA")[2] and the Consumer Credit Reporting Agencies Act ("CCRAA")[3] have overlapped since at least 1998; that ICRAA clearly applies to the background checks at issue; and that First could have complied with both ICRAA and CCRAA when it ran those background checks.[4] CDIA thus concedes that ICRAA and CCRAA are not "positively

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[1] "[W]hen two codes are to be construed, they must be regarded as blending into each other and forming a single statute. . . . Accordingly, they must be read together and so construed as to give effect, when possible, to all the provisions thereof." *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 55 Cal. 4th 783, 805 (2012); *see also United States v. Borden*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.").

[2] Civ. Code §§ 1786.10-1786.40. All subsequent references are to the Civil Code, unless otherwise noted.

[3] Civ. Code §§ 1785.1-1785.6.

[4] Defendants-Respondents First Student, Inc. and First Transit, Inc. are referred to collectively as "First." The term "background check" is used synonymously with the term "consumer report" in this brief. CDIA's amicus brief is referred to as "CDIA Br."

repugnant." That concession ends the matter and the Court should affirm the Court of Appeal.

CDIA's arguments to the contrary are without merit. For example, the Legislature knows how to create mutually explicit statutes when it intends to do so. *See, e.g.*, Civ. Code § 1785.42. CDIA argues that the Legislature did so here, but its assertion is entirely unsupported. CDIA Br. at 10.

Moreover, the 1998 amendment to ICRAA clarified that ICRAA and CCRAA overlap in their application. Ever since ICRAA was expanded to include background check reports obtained "through any means," it has been clear that some background checks are subject to ICRAA and CCRAA. Therefore, the question of how to classify reports under earlier versions of the statutes makes no difference here.

Similarly, the amendments to CCRAA and the Labor Code in 2011 do not shed any light on the effect of the 1998 amendment to ICRAA. If anything, the 2011 amendments show that the Legislature continued to intend the statutes to overlap.

Connor's Brief established, and First has conceded, that it would have been possible (indeed, relatively easy) for First to comply with both ICRAA and CCRAA in this case. Accordingly, there is no "positive repugnancy" between the statutes. In response, CDIA raises a series of abstract hypotheticals not present here. But in each of those hypotheticals a Consumer Reporting Agency ("CRA") need only apply the stricter standard in order to comply with both ICRAA and CCRAA.

Finally, it is telling that the world's largest trade association of its kind has presented no examples of any CRA actually struggling to understand whether ICRAA or CCRAA applies to a particular report. This glaring absence indicates that CDIA's hundreds of members are not

confused by ICRAA or CCRAA. CDIA's alleged concerns pale in light of the real world harm that will result to Californians if the Court strikes down ICRAA and CCRAA.[5]

LEGAL DISCUSSION

I. ICRAA and CCRAA Have Never Expressly Excluded Reports Governed by the Other.

Connor has shown that ICRAA and CCRAA have overlapped from the time of enactment until now. In response, CDIA contends that when ICRAA and CCRAA were enacted the Legislature "explicitly expressed its intention" that each statute would govern separate acts, and that "each statute expressly excluded reports governed by the other." CDIA Br. at 8, 10. Those contentions are flatly wrong. More importantly, they are not helpful in determining whether ICRAA and CCRAA overlap now, after the amendment to ICRAA in 1998.

As a preliminary matter, there are no grounds for reading wholesale mutual exclusivity into a statute where the Legislature did not write one. "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." *J.E.M. Ag. Supply, Inc. v. Pioneer Hi Bred*, 534 U.S. 124, 143-44 (2001) (upholding application of three patent laws all applicable to plants, each with differing levels of protection for property rights). Moreover, courts do not read into statutes words that the Legislature did not write. *See, e.g., Ennabe v. Manosa*, 58 Cal. 4th 697,

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[5] The amicus curiae brief filed by A New Way of Life Reentry Project, et al., ("A New Way of Life Br.") describes both the abuses that led to the enactment of ICRAA and CCRAA, and devastating results that will occur if ICRAA is not upheld. *Id.* at 7-16.

719 (2014) (upholding application of overlapping provisions of Business and Professions Code and Civil Code, where Business and Professions Code was stricter than Civil Code with regard to civil liability for sale of alcohol).

Neither ICRAA nor CCRAA has ever expressly provided that reports governed by one statute are excluded from the other. The Legislature knows how to create mutually exclusive laws when it intends to do so. For example, in Civil Code section 1785.42, the Legislature expressly excludes reports that are governed by ICRAA or CCRAA from the statute regulating commercial credit reports:

> "Commercial credit report"...does not include a report subject to Title 1.6 [CCRAA] (commencing with Section 1785.1), Title 1.6A [ICRAA] (commencing with Section 1786), or a report prepared for commercial insurance underwriting, claims, or auditing purposes.

Section 1785.42 offers a model of the clear, express language that the Legislature uses when it intends for a statute to exclude reports that are governed by another statute. If the Legislature had intended to exclude reports subject to ICRAA from CCRAA, or vice versa, it would have said so using language equally clear as the language in section 1785.42(a).

The Court should reject CDIA's contention that the Legislature's use of the phrase "pursuant to this title" means that it intended to make the statutes mutually exclusive. *Cf.* CDIA Br. at 8-9. If CDIA's argument were correct, every statute that used words such as "pursuant to this title," "pursuant to this chapter," "under this chapter," or the like would have to be read as being mutually exclusive. CDIA cites no principle of interpretation that supports its argument. The Legislature did not write "pursuant to this title and no other," and courts do not read into the statute words that the Legislature did not write. *See, e.g., Ennabe*, 58 Cal. 4th at 719.

Connor's Brief demonstrates that under the original language of ICRAA and CCRAA, reports were covered by both ICRAA and CCRAA if the reports contained information that (1) related to character *and* creditworthiness, (2) was gathered from public records *and* personal interviews, and (3) was used for employment purposes.[6] *See* RJN, Exh. A (§1785.3(1975)); RJN, Exh. B (§ 1786.18 (1975)); *see also* RJN, Exh. H (explaining coverage of 1975 version of ICRAA).

CDIA fails to refute this analysis. CDIA also ignores the fact that, from enactment until now, both ICRAA and CCRAA have covered reports that included public records. *Cf.* CDIA Br. at pp. 10-11. Connor's Brief shows that the 1975 versions of ICRAA included provisions restricting the use of public records in background check reports. *See* RJN, Exh. B. at § 1786.18 (restricting use of criminal records in background check reports subject to ICRAA); § 1786.28 (requiring "strict procedures" for CRAs to vet public record information included in background check reports subject to ICRAA).

These provisions covering the use of public reports under ICRAA demonstrate that the Legislature intended ICRAA to apply to background check reports based on personal interviews and public records. To conclude otherwise would render those provisions meaningless. CDIA has

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[6]As shown in Connor's Brief at 7-8 and n.8, a report that met these criteria would have met the requirements of CCRAA, as enacted, because it contains information bearing on a consumer's credit. It would not have been excluded from CCRAA because it did not contain information that is solely on a consumer's character. *See* Connor's Motion for Judicial Notice ("RJN"), Exh. A (§ 1785.3(c) (1975)). Such a report would also have met the requirements of ICRAA, as enacted, because it contained information on a consumer's character obtained through personal interviews. It would not have been excluded from ICRAA because it is not limited to specific factual information related to a consumer's credit record. *See* RJN, Exh. B (§ 1786.2(c) (1975)).

offered no convincing reason to reach that extreme conclusion here. *See, e.g., People v. Arias*, 45 Cal. 4th 169, 180 (2008) ("[I]n reviewing the text of a statute, we must follow the fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary.").

These two indisputable points show that there were reports to which both ICRAA and CCRAA applied even before the 1998 amendments. In other words, the statutes overlapped from their enactment.[7] But more to the point, all parties and amici agree that ICRAA and CCRAA have overlapped since the 1998 amendment. Thus it is plain that ICRAA is not unconstitutionally vague.

II. The Legislature Has Intended ICRAA and CCRAA to Overlap Since at Least 1998.

CDIA urges the Court to discern the Legislature's intent to create "separate and independent regulations" from the fact that ICRAA, as enacted, limited its coverage to reports containing information "obtained through personal interviews." CDIA Br. at 9. That argument fails because the 1998 amendment eliminated that limitation. From then until now, ICRAA has applied to reports containing information "obtained through any means." § 1786.2(c).

The 1998 amendment therefore removed the very language that CDIA relies upon in arguing that ICRAA and CCRAA were intended to be

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[7] Connor recognizes that the Court of Appeal in this case and other courts have concluded that the statutes were mutually exclusive at the time of enactment. *See Connor v. First Student, Inc.*, 239 Cal. App. 4th 526, 537 (Cal. App. 2d Dist. 2015). Connor respectfully disagrees with those courts, which failed to engage in the analysis of the public record provisions described above and in Connor's Brief. However, as the Court of Appeal concluded in this case, because this case is not governed by the 1975 version of the statutes, this issue is not one that the Court need resolve to determine that ICRAA and CCRAA are constitutional now. *Id.* at 538-39.

exclusive. That is, even if CDIA were right about the Legislature's intent in 1975 (which it is not), by 1998 the Legislature clearly intended for ICRAA and CCRAA to overlap. As the Court of Appeal explained, there is no constitutional vagueness issue now because the scope of ICRAA and CCRAA's overlap is clear: some reports are subject to both ICRAA and CCRAA, and some are subject to only one or the other statute. *See Connor*, 239 Cal. App. 4th at 538.

Furthermore, CDIA misconstrues the legislative intent of the 1998 amendment. *Cf.* CDIA Br. at 12-13. The first and most decisive guide to legislative intent is the language of the statute itself. "If the statute's text evinces an unmistakable plain meaning, we need go no further." *Pacific Palisades Bowl Mobile Estates*, 55 Cal. 4th at 803. Here, the intent of the 1998 amendment is clear from its text: The Legislature expanded ICRAA to apply to background check reports collected "by any means," and eliminated the restriction that some of the information collected had to be sourced from personal interviews. *See* Connor Br. at 8-9 (discussing 1998 amendment of § 1786.2(c)). Neither CDIA (nor First) has identified any ambiguity in this uncomplicated amendment, and the Court need go no further to uphold ICRAA here.

However, should the Court delve more deeply into the legislative history, that history also supports Connor. Senator Leslie, the author of the 1998 amendment, argued forcefully that ICRAA should be expanded to cover many different types of reports, in particular reports gathered from public records that were increasingly available. RJN, Exh. G at 3. *See also* Amicus Brief of the Attorney General in Support of Plaintiff and Appellant at 11-12 (discussing purposes of 1998 amendment to "expand[ ] the rights and protections afforded to consumers who are the subject of investigations"). That expansion, and its overlap with CCRAA, were therefore intentional.

III. The 2011 Amendments Are Not Relevant.

The 2011 amendments to CCRAA and the Labor Code do not change the analysis. There is no support for CDIA's assertion that the purpose of the 2011 amendments was to "reduce the circumstances under which there would be overlap between the CCRAA and ICRAA." *Cf.* CDIA Br. at 12 n.1. To the contrary, the purpose of the 2011 amendments was to limit the situations in which a credit report under CCRAA could be requested for employment purposes. *See* § 1785.20.5(a) and Labor Code § 1024.5. Thus, the Legislature has continued to expand the rights of employees subject to background checks, a fact that supports giving effect to statutes regulating such checks, including ICRAA here.

Furthermore, CDIA concedes that the Legislature was aware that ICRAA and CCRAA overlapped following the 1998 amendment. *See* CDIA Br. at 12 n.1 (arguing that the Legislature "recogniz[ed] the overlap between the two statutes"). CDIA's argument further concedes that when the Legislature amended CCRAA in 2011, it did not eliminate that overlap. If anything, then, the 2011 amendments show that the Legislature has continued to intend that ICRAA and CCRAA overlap.

Finally, the 2011 amendment of CCRAA is irrelevant to the facts of this case. The facts giving rise to this case occurred in 2007 and 2010, when First had background checks run on Ms. Connor. *See* First Br. at 3; Connor Br. at 5. The Legislature's amendment of CCRAA in 2011 and subsequent enactment of Labor Code section 1024.5 do not shed any light on whether it intended ICRAA and CCRAA to overlap either at the time of enactment, following the 1998 amendment, or when the facts of this case arose. *See, e.g., Peralta Community College Dist. v. Fair Employment & Housing Com.*, 52 Cal. 3d 40, 52 (1990) ("The declaration of a later Legislature is of little weight in determining the relevant intent of the

Legislature that enacted the law."). This is especially true where, as here, "a gulf of decades separates the two [legislative] bodies." *Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 244 (1997). The Court should thus "give little weight to the views of the Legislature of 2011 as to what the Legislature" of 1975 or 1998 intended. *See Apple Inc. v. Superior Court*, 56 Cal. 4th 128, 145-146 (2013) ("The declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law.") (internal citation, quotation marks omitted).

IV. Because ICRAA and CCRAA Are Not "Positively Repugnant" They Must Both Be Upheld.

Connor has shown, and First has conceded, that in this case it would have been simple and easy for First to comply with both statutes. Connor Br. at 29; First Op. Br. at 37, 38. For that reason alone, ICRAA and CCRAA are not "positively repugnant." *See Powell*, 339 U.S. at 519 (where there are two overlapping statutes and "[t]here has been no presentation of instances . . . where compliance with one Act makes it impossible to comply with the other," then the court is to "apply[ ] the higher requirement as satisfying both").[8] In response, CDIA has attempted to manufacture an argument that ICRAA and CCRAA are repugnant to each other. Its argument fails for two reasons.

First, CDIA's repugnancy argument is based upon abstract hypothetical situations. *See, e.g.*, CDIA Br. at 18. However, the analysis

[8] As discussed in the amicus curiae brief filed by the Public Good Law Center ("Public Good Br."), at 8-13, and below at Section VI, the issue of whether two statutes are incompatible with each other because they make it impossible to comply with both of them raises the possibility of implied repeal, not unconstitutional vagueness. There is neither evidence of an implied repeal nor unconstitutional vagueness here.

of whether a statute is void for vagueness must be conducted "in a specific *context*." *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1116 (1997) (emphasis in original). The question is not whether the statute "is vague in the abstract, but rather, whether it is vague as applied . . . in light of the specific facts of this particular case." *Cranston v. City of Richmond*, 40 Cal. 3d 755, 765 (1985).

CDIA's abstract hypotheticals are therefore not availing. Moreover, CDIA is the "largest trade association of its kind in the world, with a membership of approximately 180 consumer credit and other specialized CRAs operating throughout the United States and the world." CDIA Br. at 2. Yet it has not presented a single actual example of any of its members (or anyone else) experiencing any of the potential problems posited in its brief.[9] It is reasonable to infer from that omission that the hypothetical problems raised by CDIA have not arisen in the real world.

Second, CDIA has not presented a single hypothetical situation in which compliance with either ICRAA or CCRAA makes it impossible for a CRA to comply with the other statute. Rather, in each of CDIA's hypothetical situations, a CRA need only ask whether ICRAA and CCRAA both apply to a report. If the answer is yes, the CRA need only apply the higher, more protective requirement in order to satisfy both.

For example, both ICRAA and CCRAA permit CRAs to furnish reports to persons whom the agencies believe will use the report for one or more particular purposes. §§ 1785.11; 1786.12. The lists of permitted purposes under the statutes are virtually identical. However, CCRAA

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[9] By comparison, A New Way of Life Reentry Project's amicus brief provides real-world examples of the abuses that led to the 1998 amendment of ICRAA, as well as the harm that will follow if that statute is found to be unconstitutional. *See* A New Way of Life Br. at 7-16.

permits a CRA to furnish a report to a person it has reason to believe "has a legitimate business need for the information in connection with a business transaction involving the consumer." § 1785.11(a)(3)(F). ICRAA does not. § 1786.12(d). [10]

Accordingly, ICRAA's list of permissible purposes is narrower than CCRAA's. If a report falls under both ICRAA and CCRAA, a CRA must comply with that narrower standard. If it does so, it will comply with both statutes and violate neither.

Similarly, "consumer credit reporting agencies," as defined in the CCRAA,[11] are required to provide all information in the files of consumers who request them. § 1785.10(c). "Investigative consumer reporting agencies," as defined in the ICRAA,[12] are required to provide all information except source information other than information from public records. § 1786.10(b)(1).

Thus, if a consumer requests his or her file from a CRA, the CRA need only ask whether it meets the definition of "consumer credit reporting agency" and/or the definition of "investigative consumer reporting agency." If it meets both, it must disclose all of the information in the consumer's file. In so doing, it will comply with both statutes and violate neither.

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[10] As a practical matter, the purposes listed in section 1786.12(d) are so broad that CDIA's hypothetical concerns are unlikely to ever arise in the real world. Furthermore, CDIA's concern is not relevant here, because both ICRAA and CCRAA cover reports that are obtained for "employment purposes." §§ 1785.3(e); 1786.2(f). The statutes define a report used for employment purposes in identical terms, as "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee." §§ 1785.3(e); 1786.2(f).

[11] § 1785.3(d).

[12] § 1786.2(d).

The same is true for each of the other hypothetical situations raised by CDIA. CDIA Br. at 19-20. If a report falls under both statutes, a CRA must disclose upon request any recipients of the report within the preceding three years. *Compare* § 1785.10(d)(1)(A), (B) (requiring disclosure of recipients within one or two years of the request) *with* § 1786.10(c)(1), (2) (requiring disclosure of recipients within three years of the request). If a report falls under both statutes, a CRA must permanently retain certain consumer information. *Compare* § 1785.14(b) (requiring permanent retention of certain data) *with* § 1786.20(b) (requiring retention for two years). If a report falls under both statutes, the CRA can only charge a consumer who requests a copy the lesser of the amounts permitted by the statutes. *Compare* § 1785.15(f) (permitting a CRA to charge no more than $8 for a copy of a report) *with* § 1786.22(b)(1) (permitting a CRA to charge no more than the actual cost of copying a report). And, finally, if a report falls under both statutes, the consumer may lodge a 500 word statement of dispute. *Compare* § 1785.16(f) (permitting consumer to lodge 100 word statement of dispute) *with* § 1786.24(i) (permitting consumer to lodge 500 word statement). In each of these situations, a CRA need only apply the higher, more protective standard to comply with both statutes.

As set forth above, none of these abstract hypotheticals are present in this case. And none of these abstract hypotheticals involve situations in which compliance with one statute makes it impossible to comply with the other.

Rather, the differences in statutory requirements that CDIA points out indicate that this case is like numerous others in which California courts have upheld overlapping statutes with different requirements. *See, e.g.*, *Pacific Palisades Bowl Mobile Estates*, 55 Cal. 4th at 805 (holding that developer could be subject to three overlapping statutes regulating the same

development, each with different requirements); *Sanchez v. Swissport*, 213 Cal. App. 4th 1331, 1335, 1341 (2013) (holding that employer was subject to both Pregnancy Disability Leave Law and potentially stricter standards of Fair Employment and Housing Act); *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.*, 59 Cal. App. 3d 959, 965 (1975) (holding that timber harvester was required to comply with both Forest Practice Act and California Environmental Quality Act).

V. *Ortiz* Was Wrongly Decided.

As Connor has shown, there is no "void for overlap" rule of statutory construction. In arguing to the contrary, CDIA relies heavily on *Ortiz v. Lyon Management Group, Inc.*, 157 Cal.App.4th 604 (2007), which found ICRAA and CCRAA to be unconstitutionally vague because they overlap.

However, to survive a challenge based on vagueness a statute must only "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Here, for the reasons set forth in both Connor's Brief and the amicus curiae brief of the Attorney General, ICRAA easily meets this test. *See* Attorney General's Br. at 13 (describing the simple two-step test that CRAs can use when determining whether ICRAA applies to a particular consumer report).

Furthermore, where, as here, there are two laws that act upon the same subject, the proper doctrine to apply is that of implied repeal. As explained in the amicus curiae brief filed by the Public Good Law Center, et al., under that doctrine, courts must "give effect to both [laws] if possible." Public Good Br. at 8 (*quoting United States v. Borden Co.* 308 U.S. 188, 198 (1939)). Only if the laws are irreconcilable may a court find that one has been repealed by implication. *Id.*

Here, neither CDIA nor First has even attempted to argue that it would have been impossible to comply with ICRAA and CCRAA.[13] For these reasons, *Ortiz* and its progeny were wrongly decided.

VI. CRAs Have Had Ample Notice Since 1998 That Both ICRAA and CCRAA Apply to Many Types of Reports.

CDIA's final argument is that CRAs do not have notice as to which statute applies to their actions. CDIA Br. at 22. That argument is meritless. Since at least 1998, CRAs have known that both ICRAA and CCRAA apply to consumer reports that meet the requirements of both statutes. As demonstrated in the Public Good Brief, "[p]ublished practice guides explaining federal and state consumer reporting statutes simply state that employers must comply with both the ICRAA and the CCRAA." Public Good Br. at 14-15. In short, CRAs have had ample notice for more than a decade and a half that both ICRAA and CCRAA apply to many categories of consumer reports.

CONCLUSION

As the *Connor* court noted, the contention that ICRAA and CCRAA were intended not to overlap is "simply is not supported by the language of the acts as now amended." *Connor*, 239 Cal. App. 4th at 538. Rather, by giving effect to the language of both acts, "the constitutional vagueness issue identified by *Ortiz* [157 Cal. App. 4th 604], and relied upon by First, disappears." *Connor*, 239 Cal. App. 4th at 539.

This analysis applies with equal force to the arguments raised by CDIA. For all of the reasons set forth above and in Connor's Brief, the decision of the Court of Appeal should be upheld.

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[13] First concedes that it could have complied with both ICRAA and CCRAA. First Op. Br. at 37, 38.

June 3, 2016

Respectfully submitted,

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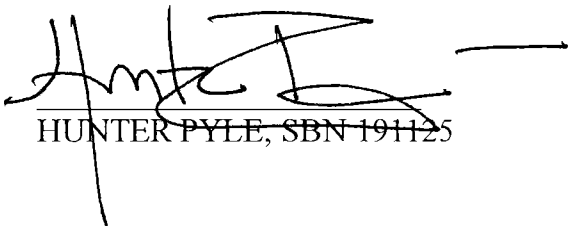
By: 

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