IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ANSWER TO PETITION FOR REVIEW

From a Decision by the Second Appellate District, Division Four

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EILEEN CONNOR,	)	Supreme Court Case No. S229428
	)	
Plaintiff and Appellant,	)	Appeal No. B256075
	)	
v.	)	Los Angeles County Super. Ct. No.
	)	JCCP 4624
FIRST STUDENT, INC., et al.,	)	(In re First Student, Inc. Cases)
	)	
Defendants and Respondents.	)	Trial Judge: The Hon. John S. Wiley
	)	

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Other Authorities

ANSWER TO PETITION FOR REVIEW

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

Pursuant to Rule 8.500(a)(2) and (e)(4), California Rules of Court,[1] Plaintiff and Appellant Eileen Connor answers the petition for review by Defendants-Respondents First Student, Inc. and First Transit, Inc. (collectively, "First"). As discussed below, this Court should deny review because (1) review is not necessary to secure uniformity of decision or to settle an important question of law; and (2) proceedings are not complete in the Court of Appeal against Respondents in the related and consolidated appeal of *Gonzalez v. HireRight Solutions, Inc. and HireRight, Inc.* (Second District Court of Appeal Case No. B256077).

QUESTION PRESENTED

Do well-settled principles of statutory interpretation require that mutual effect be given to two overlapping statutes that govern employment-related background checks in California, the Investigative Consumer Reporting Agencies Act (ICRAA, Civil Code § 1786 et seq.), and the Consumer Credit Reporting Agencies Act (CCRAA, Civil Code § 1785.1 et seq.), as the Court of Appeal held?[2]

STATEMENT OF THE CASE

The Court of Appeal's opinion summarizes the relevant law and facts. As that opinion describes, both ICRAA and CCRAA regulate consumer reporting agencies and those entities to which the agencies provide information in the form of consumer reports. ICRAA covers investigative consumer reports, which pertain to a consumer's character, general reputation, personal characteristics, or mode of living. CCRAA,

[1] Further undesignated rule references are to the California Rules of Court.
[2] Further undesignated statutory references are to the Civil Code.

meanwhile, covers consumer credit reports, which pertain to information on a consumer's credit worthiness, credit standing, or credit capacity. ICRAA is narrower in scope in that it only governs reports that are to be used for the purposes of employment, tenant screening, and personal insurance, is somewhat stricter than CCRAA, and affords greater remedies. (Opinion ("Op.") at p.2.)

This case involves investigative consumer reports—background checks—run on school bus drivers and aides. ICRAA requires an employer to take two steps before it can run a background check. First, the employer must disclose, in a document consisting solely of the disclosure, that it will run the background check. § 1786.16(a)(2)(B). Second, the employer must obtain the employee's written authorization. § 1786.16(a)(2)(C). Here, Plaintiffs assert that First violated their rights by running background checks without the disclosure or consent that ICRAA requires. (Op. at p.4.)

Plaintiffs also sued defendants HireRight Solutions, Inc. and HireRight, Inc. (collectively, "HireRight"), the agencies that performed the background checks for First. ICRAA provides that before an investigative consumer agency can prepare a background check for an employer, the agency must obtain a certification that the employer has made the required disclosures. §§ 1786.12(e); 1786.16(a)(4). Plaintiffs assert that HireRight failed to obtain this certification but ran the checks anyway.

This case is not a class action. The individually affected bus drivers and aides filed suit, and their complaints were then coordinated under Rule 3.550. For purposes of summary judgment and trial, First selected Eileen Connor (among other plaintiffs) as a bellwether plaintiff in the coordinated cases, while HireRight selected Jose Gonzalez (among others).

The Los Angeles Superior Court granted First's and HireRight's motions for summary judgment. The Superior Court concluded that ICRAA was unconstitutionally vague under *Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604 ("*Ortiz*"). It pointed to no vagueness or lack of clarity in ICRAA itself. Rather, the Superior Court found ICRAA void for vagueness merely because another statute, CCRAA, may also have applied to First's and HireRight's conduct in this case. (Op. at pp.2-3.)

Ms. Connor and Mr. Gonzalez appealed. Following a stipulation of the parties and a joint request, the Court of Appeal consolidated the two appeals for purposes of briefing, joint appendices, oral argument, and decision. However, HireRight then filed for bankruptcy under Chapter 11, and the appeal was stayed as to HireRight. (See Op. at p.5.) The appeal against First proceeded, and the Second District Court of Appeal reversed.

The Court agreed with Ms. Connor that (1) "ICRAA applies to the background checks at issue in this case"; (2) "the fact that the CCRAA might also apply to those same background checks does not render the ICRAA void for vagueness"; and (3) "*Ortiz* was wrongly decided because it failed to consider case law governing the interpretation of overlapping statutes." (Op. at p.5.) In sum, ICRAA is not unconstitutionally vague as applied to the background checks in this case because "[t]here is nothing in either the ICRAA or the CCRAA that precludes application of *both* acts to information that relates to both character and creditworthiness." (Op. at p.3 (emphasis in original).)

ARGUMENT

I. This Court's Review Is Not Necessary to Secure Uniformity of Decision or to Settle an Important Question of Law.

A. This Court's Review Is Not Necessary Because the Court of Appeal Followed Uniformly Accepted Principles of Statutory Interpretation.

Despite the Second District's disagreement with *Ortiz*, this Court's review is not "necessary" within the meaning of Rule 8.500.

The Court of Appeal relied on well-established principles of statutory interpretation to conclude that "[t]he fact that the two acts [ICRAA and CCRAA] overlap in their coverage of some consumer reports does not render the acts unconstitutionally vague to the extent of that overlap." (Op. at p.13.) These basic principles, repeatedly affirmed by United States and California Supreme Courts, begin with the observation that "[r]edundancies across statutes are not unusual events in drafting." (Op. at p.14, citing *Connecticut Nat. Bank v. Germain* (1992) 503 U.S. 249, 253-254.) Accordingly, "so long as there is no 'positive repugnancy' between [ ] two laws . . . a court must give effect to both." (*Id.*; see also, e.g., *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805 (explaining that a court must give effect to two overlapping statutes unless the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation").)

First cannot and does not cite any authority contrary to the basic rule of statutory interpretation governing the interpretation of overlapping statutes. As *Ortiz* did not consider or apply this rule, the Court of Appeal's decision in this case is best viewed as a correction of an earlier oversight.

Moreover, CCRAA and ICRAA are far from repugnant to each other. To the contrary, they do not even conflict. As the Court of Appeal held, after the Legislature amended ICRAA in 1998, consumer reports "are governed by the ICRAA under its clear and unambiguous language," as well as by CCRAA. (Op. at p.13.) "[T]here is no 'positive repugnancy' between the CCRAA and the ICRAA," because persons subject to the acts "can comply with each act without violating the other." (Op. at p.14.) Accordingly, the Court of Appeal held correctly that it "can—and must—give effect to both acts." (Op. at p.15.)

B. This Court's Review Is Not Necessary Because There Is No Significant Split in Authority.

Furthermore, First exaggerates the extent of the precedent that followed *Ortiz*. There are only three such cases, including one companion case and two unpublished federal trial court decisions. The companion case is *Trujillo v. First American Registry* (2007) 157 Cal.App.4th 628. The same panel that decided *Ortiz* decided *Trujillo* on the very same day. Unsurprisingly, *Trujillo* simply followed *Ortiz*.

As for the two federal trial court decisions, *Roe v. LexisNexis Solutions, Inc.*, Civ. No. 12-6284, 2013 U.S. Dist. LEXIS 88936 (C.D. Cal. Mar. 19, 2013), has settled. The other, *Moran v. The Screening Pros*, Civ. No. 12-0508, 2012 U.S. Dist. LEXIS 158598 (C.D. Cal. Sept. 28, 2012), is on appeal to the Ninth Circuit, where briefing and argument are complete. In none of these cases did the courts address the principles of statutory interpretation that the Court of Appeal followed here.

To the extent that First's argument that ICRAA is unconstitutionally vague depends on its claim that CCRAA "specifically authorized" its conduct in running a background check, there is no authority supporting its

position. *Ortiz* did not so hold. And the Court of Appeal correctly observed that "CCRAA does not 'specifically authorize' anything." (Op. at p.15.)

C. This Court's Review Is Not Necessary Because There Is No Confusion as to the Requirements for Running Background Checks in California.

Finally, the record does not support the assertion that there is practical confusion as to California law governing background checks. Although the Consumer Data Industry Association and First contend otherwise, they identify no evidence of any such confusion other than their bald assertions. Furthermore, numerous published practice guides demonstrate that there is no such confusion.

Indeed, as Ms. Connor pointed out in her briefing on appeal, First has acknowledged that, by its plain language, ICRAA applies to this case. (See Joint Appendix filed in Court of Appeal, Vol. 5 p.111:6-7, Joint Appendix Vol. 6 p.332:19-22.) First could not contend otherwise, because the plain text of ICRAA since its amendment in 1998 shows that it applies. Indeed, as the Court of Appeal observed, the form that First sent Ms. Connor regarding her background check "contained [ ] a section entitled 'Notice to California Applicants,' which set forth the applicant's rights under the ICRAA, and specifically referred to section 1786.22 of the act." (Op. at p.4 fn.3.) It is therefore clear that First knew that ICRAA applied to Ms. Connor's background check before it ordered that check.

More generally, businesses like First have been operating under restrictions imposed by the post-1998 ICRAA and CCRAA for over fifteen years, and there is no evidence of confusion. For example, published practice guides explain that employers must comply with both ICRAA and CCRAA where appropriate. See, e.g., Charles H. Kennedy (2008) *Business*

Privacy Law Handbook, at p.110 ("disclosure and other requirements in FCRA [the Fair Credit Reporting Act], ICRAA, and CCRAA are highly duplicative, but California employers must be careful to comply with all of them"); Douglas J. Farmer (2013) *California Employment Guide: The Complete Survival Guide for Doing Business in California*, at §§ 14.1-14.11 (providing detailed explanation of each of the reporting laws and identifying which law(s) must be complied with in various circumstances); *Background Checks in Employment* (Presentation) (emphasizing that companies should employ "a separate disclosure/consent form that contains all required disclosures under ICRAA, CCRAA, and FCRA" because "California employers must comply with ALL three").[3] Clearly, employers and agencies need not "struggle to understand their rights and obligations under California law." Cf. Letter from Simon J. Frankel, Covington & Burling LLP, on behalf of the Consumer Data Industry Association (Sept. 21, 2015).

II. The Procedural Posture of This Case Poses Potential Complications for Review.

As shown above, this Court should deny review of the Court of Appeal's decision because there is no uncertainty that needs to be resolved. However, even if the Court were inclined to grant review on the issues presented, it should not do so at this time. Mr. Gonzalez's consolidated appeal against Respondent HireRight is still pending, and how it will be resolved is uncertain and potentially complicated.

As described above, when HireRight filed for bankruptcy, Mr. Gonzalez's consolidated appeal as to the HireRight entities was stayed.

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[3] *Available at* http://www.klgates.com/files/upload/Presentation_Background_Checks.pdf (last visited October 12, 2015).

(Op. at pp.4-5, fn.4) The Court of Appeal opinion therefore "address[ed] only First's judgment against Connor." (*Ibid.*) On October 5, 2015, however, the Court of Appeal ordered the stay of Mr. Gonzalez's appeal lifted pursuant to 11 U.S.C. § 362. The Court also issued an order to show cause within 20 days why the appeal should not be dismissed as moot, following the approval of a Plan of Reorganization by the U.S. Bankruptcy Court for the District of Delaware.

What happens next in the Court of Appeal and in the bankruptcy court will depend on the actions of those courts, in response to the parties' briefing that has yet to be submitted. Mr. Gonzalez will be pursuing his rights in this case in either or both courts, as his claims remain to be adjudicated under the bankruptcy plan.

Ms. Connor therefore respectfully submits that if the Court does not deny review entirely, it would be appropriate for this Court to wait to decide whether or not to grant review until such time as the status of Mr. Gonzalez's consolidated appeal is clarified.

CONCLUSION

For all the reasons stated above, Plaintiff-Appellant Connor respectfully requests that this Court deny First's petition for review.

Dated: October 13, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.504(d)(1), California Rules of Court, the text of this Answer to Petition for Review, including footnotes and excluding the Table of Authorities, Table of Contents, cover text, and signature block, is 2,067 words, as determined using the word count function of the word processing program used to prepare this document.

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