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 REPLY BRIEF ON THE MERITS

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## I.

## INTRODUCTION

For the first 25 years after the enactment of California's Consumer Credit Reporting Agencies Act (the "CCRAA") and the separate and distinct statute, the Investigative Consumer Reporting Agencies Act (the "ICRAA"), the CCRAA - not 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.

As First established in its Opening Brief, the ICRAA's 1998 amendment caused it to overlap with the CCRAA because the ICRAA's definition of background reports was expanded to include those containing information on an applicant/employee's character "obtained through any means." Accordingly, background reports, such as the ones at issue in this action, were potentially covered by both statutes. Neither the CCRAA nor the ICRAA however, provided notice that an employer is required to comply with the ICRAA when requesting a background report subject to the CCRAA and in accordance with its requirements. This caused the ICRAA to be unconstitutionally vague and unenforceable because, an employer requesting a background report as authorized by and in compliance with the CCRAA is potentially liable for the ICRAA's $10,000 penalty without notice that it may be held to a more stringent standard. In other words, an individual or entity can potentially be held liable for the ICRAA's $10,000 penalty for engaging in otherwise completely legal conduct.

In this action, Ms. Connor and each of the other plaintiffs, is seeking to hold First legally liable for the ICRAA's $10,000 penalty for engaging in completely legal conduct - requesting a background report as authorized by the CCRAA. Ms. Connor does not dispute First was authorized by CCRAA to obtain the subject background reports on her. Indeed, the CCRAA specifically states a consumer report under its provisions can be requested for employment purposes,

such as First did in this case. See Cal. Civ. Code § 1785.3(f); (Answering Brief, p. 17).

She also does not dispute First complied with the CCRAA when it procured or caused the subject background reports to be prepared. Indeed, Ms. Connor ignores these facts as they are fatal to her claims. Rather, she argues that, even though First's conduct was expressly authorized by and in compliance with the CCRAA, First should still be found to have violated the ICRAA's separate and distinct statutory scheme for the sole reason that it was not impossible for First to comply with both statutes at the same time – i.e. there is no "positive repugnancy" between the two. *Connor v. First Student, Inc.* (2015) 239 Cal.App.4th 526, 539. This however, is not the law.

In fact, her argument shows the ICRAA, as it existed during the pertinent time period, is unconstitutionally vague as applied to this action. It is because it violates "the first essential of due process of law", *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 629, that a statute "give [a] 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. Accordingly, it is not whether the statutes overlap and First could have complied with both that renders the ICRAA unconstitutionally vague. Rather, it is the fact the ICRAA provides no notice that First was required to comply with its provisions when requesting a background report in compliance with the CCRAA. It is the ICRAA's failure to do so that causes it to be unconstitutionally vague and unenforceable because it "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning." *Roberts*, 468 U.S. at 629.

Ms. Connor admits neither the CCRAA nor the ICRAA contain any language stating, or even intimating, a party requesting a background report in compliance with the CCRAA must also comply with the ICRAA. Rather, as Ms. Connor admits, they are separate and distinct statutes with separate and distinct

requirements and remedies. Accordingly, it would be unconstitutional for First to be found liable under the ICRAA for engaging in conduct specifically authorized by the CCRAA. *Roberts*, 468 U.S. at 629. Unlike the Courts in *Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604 and *Trujillo v. First American Registry* (2007) 157 Cal.App.4th 628. Ms. Connor and the appellate court below both failed to address this fact.

Indeed, neither Ms. Connor nor the court below cited to any case, or other legal authority supporting their conclusion that a party can be potentially liable for violating one statute when engaging in conduct expressly permitted by another. While First has looked, it has not found any such authority. Indeed, as stated above, Ms. Connor admits the CCRAA authorizes an employer such as First to procure background reports for employment purposes such as First did in this case. Cal. Civ. Code § 1785.3(f). Rather, Ms. Connor and the appellate court below rely exclusively on a number of inapposite cases that do not support their position that First could be held liable for engaging in legal activities.

Finding First violated the ICRAA when it requested the subject background 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 procured or caused to be prepared the subject consumer reports in the manner Ms. Connor suggests, would render the CCRAA "superfluous" as to those reports that are simultaneously subject to both. Ms. Connor does not argue otherwise.

For the reasons stated in First's Opening Brief and below, First 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 To The Subject Consumer Reports Because They Are Simultaneously Subject To The CCRAA And The ICRAA.

As First established in its Opening Brief, and as held by the *Ortiz* and *Trujillo* courts, as well as the United States District Courts that have considered the issue, the ICRAA is unconstitutionally vague as applied to background reports that are simultaneously subject to the CCRAA and the ICRAA. Ms. Connor's contentions to the contrary are without merit. Indeed, her argument that the ICRAA is not unconstitutionally vague as applied to the subject background reports only looks at half of the equation. (Answering Brief, p. 16.) She fails to address that the reports are also covered by the CCRAA, but neither the CCRAA nor the ICRAA state a party requesting a report subject to both must comply with both.

As the *Ortiz* and *Trujillo* Courts correctly held, it is this overlap – the CCRAA and the ICRAA applying to the same background reports at the same time - that causes the ICRAA to be unconstitutionally vague as applied to the subject background reports. It is so because a party, such as First, that requests a consumer report in complete compliance with the CCRAA is potentially subject to the ICRAA's $10,000 penalty. In other words, Ms. Connor would have this Court interpret the CCRAA and the ICRAA in a way to find First liable for the ICRAA's penalty for engaging in completely legal conduct. This is simply not a "reasonable and practical construction" of the two statutes. *Lockheed Aircraft Corp. v. Superior Court of Los Angeles County* (1946) 28 Cal.2d 481, 484. Rather, as established in First's Opening Brief, because the ICRAA does not provide notice that a party requesting a background report as authorized by the CCRAA must

also comply with its provisions, it violates "the first essential of due process of law" and is therefore unconstitutionally vague. *Roberts*, 468 U.S. at 629.

### 1. It Is Undisputed That First Complied With The CCRAA When It Requested The Subject Background Reports.

Significantly, Ms. Connor does not dispute that First complied with the CCRAA when requesting the subject consumer reports. Indeed, while Ms. Connor tries to make much of the fact that "HireRight furnished the reports for employment purposes, i.e., so that First could determine whether to employ Ms. Connor and other school bus drivers and aides" as permitted by the ICRAA, she fails to acknowledge First was also specifically permitted to do so by the CCRAA. Indeed, the CCRAA expressly applies to consumer reports obtained for an "employment purpose" such as those First requested in this action. (Answering Brief, p. 17); Cal Civ. Code § 1785.3(f).

The term "employment purpose" under the CCRAA, like the ICRAA is defined as a report that 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).

Because Ms. Connor admits First requested and used the consumer reports to "in making decision about Plaintiff's employment," she admits First used it for a purpose specifically authorized by the CCRAA. (JA, p. 36:1-3); Cal Civ. Code § 1785.3(f). Indeed, for the First 25 years after the CCRAA was enacted it, and not the ICRAA, governed obtaining background reports for employment purposes that did not contain information obtained from personal interviews.

Ms. Connor also admits that First complied with the CCRAA's requirements before requesting the subject background reports. It is undisputed that, at the time First requested Ms. Connor's background 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.

First gave her the Notice. (JA, Vol. I, p. 166.) 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.) 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.*) Finally, the Notice included a box she could check to request a copy of the report. (*Id.*)

First's compliance with the CCRAA is further established by Ms. Connor's admission, and the Second Appellate District's conclusion, that none of the subject background reports contained information obtained by personal interviews – i.e. they contained no information excluded by the CCRAA. (JA, Vol. IV, p. 951-952; JA, Vol. X, p. 2298:14-18); Cal. Civ. Code § 1785.3(c); Connor, 239 Cal.App.4th at 535. That the background reports First requested contained criminal record information, such information is specifically regulated by the CCRAA as well as the ICRAA. See Cal. Civ. Code §§ 1785.13(a)(6), 1786.18(a)(7).

Accordingly, it cannot be disputed that the subject consumer reports were covered bythe CCRAA and First procured or caused them to be prepared in a manner specifically authorized by the CCRAA.

That the subject background reports were also covered by the ICRAA following its 1998 amendment does not change this fact. Indeed, it is for this reason that the CCRAA and the ICRAA simultaneously applied to these reports, but the ICRAA provided no notice that First was required to also comply with its provisions, causes the ICRAA to be unconstitutionally vague as applied in this action. That an employer may be aware the ICRAA exists does not mean the ICRAA provides notice that the employer is required to comply with its provisions.

### 2. The ICRAA Does Not Provide Any Notice That A Party Requesting A Consumer Report In Compliance With The CCRAA Is Required To Comply With Its More Stringent Requirements.

Ms. Connor's argument that the ICRAA is not unconstitutionally vague because its "requirements for what employers must do before obtaining background reports regarding employees are easy to understand and follow" is irrelevant to this action as it misses the pertinent issue. (Answering Brief, p. 18.) The pertinent issue in this action is not whether First could have complied with the ICRAA. It is whether the ICRAA provided First notice that it was required to do so, in addition to complying with the CCRAA, when requesting the subject background reports as permitted by the CCRAA. Neither Ms. Connor nor the appellate court below cited any provision in the ICRAA, nor any case holding First was required to do so.

Indeed, in her Answering Brief, Ms. Connor effectively concedes there is nothing in the CCRAA or the ICRAA indicating an employer requesting a consumer report in compliance with the CCRAA's provisions is also required to comply with the ICRAA's stricter requirements. As First pointed out in its Opening Brief, this Illustrates the fundamental problem in this action – that a party can comply with one statute while also seemingly be held to violate a separate and distinct statute covering the exact same subject. Stated another way, following the ICRAA's 1998 amendment, a party requesting a background report can potentially

be held liable for the ICRAA's ten thousand dollar ($10,000) penalty for engaging in completely legal conduct authorized by the CCRAA. Such a result is clearly unconstitutional.

### B. The Post 1998 ICRAA's Overlap With The CCRAA Causes It To Be Unconstitutionally Vague As Applied To The Background Reports At Issue In This Action.

Ms. Connor makes a significant concession when she admits "both ICRAA and CCRAA apply to background checks that could be described as both 'character' reports under ICRAA and 'creditworthiness' reports under CCRAA." (Answering Brief, p. 20.) Respondent's concession that "neither ICRAA nor CCRAA has ever stated that a report must fall under either one statute or the other" and neither "statute ever stated that a report that falls under one statute may not fall under the other", while a correct statement of the CCRAA and ICRAA's language, does not mean that a party can be held liable for violating one statute when complying with the other when requesting a consumer report potentially subject to both. (*Id.* at p. 22.) Indeed, the legislative history of the statutes show this is not the case.

When originally enacted, the CCRAA and the ICRAA were intended to apply to different and distinct reports, including employment screening reports. This clear and distinct separation allowed an individual or entity requesting a consumer report to determine which statute it had to comply with when requesting a background report. The Legislative history of the two statutes makes this intentional separation clear.

In 1970, the California Legislature passed the Consumer Credit Reporting Act regulating the consumer credit reporting industry. (former Civ. Code § 1785.1 et seq.). Stats. 1970, c. 1348, p. 2512, § 1, repealed by Stats. 1975, c. 1271, 0.3377, § 2. Later that same year, Congress passed the federal Fair Credit Reporting Act ("FCRA"), which 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 included provisions governing screening reports compiled from information obtained by "personal interviews" (defined by the FCRA as "investigative consumer reports"). Id. at § 1681a(e).

The Consumer Credit Reporting Act was repealed in 1975, and replaced with the CCRAA and the ICRAA. Stats. 1975, c. 1272, p. 3378, § 1 (ICRAA); Stats. 1975, c. 1271, p. 3369, § 1 (CCRAA). The passage of these two separate and distinct acts reflected the Legislature's intent to establish two independent statutes. Indeed, while the FCRA defined an "investigative consumer report" as a type of "consumer report," the ICRAA was established to independently govern only investigative consumer reports (i.e., screening reports compiled based on information from personal interviews). Second, whereas the FCRA's definition of a "consumer report" encompassed information bearing on any of seven 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, general reputation, personal characteristics, and mode of living).

Indeed, the original statutory definitions in the CCRAA and the ICRAA reflected this deliberate separation. As originally enacted, 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 a report that is limited to specific factual information relating to a consumer's credit record. Hist. and Statutory Notes, Civ. Code § 1786.2(c). The CCRAA defined a "consumer credit report" as one containing "information bearing on a consumer's credit worthiness, credit standing, or credit capacity," and excluded from its

coverage reports containing character information obtained through personal interviews. Hist. and Statutory Notes, Civ. Code § 1785.3(c).

The foregoing establishes California's Legislature intended the CCRAA and the ICRAA to be separate and distinct statutes meant to apply to separate consumer reports from their inception. Indeed, other than intending they be in *pari materia* and touch on the same subject – a background report's preparation and procurement – the Legislature intended they apply to different types of reports based on the sources of the information contained in them.

It is undisputed that the CCRAA and the ICRAA both apply to consumer reports that are procured and prepared for "employment purposes." Cal. Civ. Code §§ 1785.3(f), 1786.2(f). It also cannot be disputed that both statutes define an "employment purpose" the same way - a report "used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee." Cal. Civ. Code §§ 1785.3(f), 1786.2(f). Moreover, it is also without dispute that, when originally enacted, the CCRAA and the ICRAA differentiated between "consumer reports" obtained for employment purposes subject to their provisions by differentiating between the manner by which the information in a report was obtained.

For example, the CCRAA originally defined, and continues to define today, a consumer report subject to its provisions as one containing any "information bearing on a consumer's credit worthiness, credit standing, or credit capacity" and excludes 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).

When originally enacted, the ICRAA defined a consumer report falling under its jurisdiction as being 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.

Significantly, as the foregoing demonstrates, prior to 1998, the CCRAA and the ICRAA's respective definitions specifically excluded consumer reports that were subject to the other's provisions. 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. Ms. Connor does not dispute this fact.

By phrasing the scope of these two statutes as they did, there can be no doubt that California's Legislature both established and intended the CCRAA and the ICRAA to operate as separate and distinct statutes. Indeed, while the CCRAA and the ICRAA both touched on the same general class of background reports, they 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. Therefore, unlike the FCRA, which applies to both "investigative consumer reports" and "consumer credit reports," California's Legislature clearly intended that the ICRAA and the CCRAA each exclusively apply to consumer reports containing different and distinct types of information. Id.; see also *Ortiz*, 157 Cal.App.4th at 613-615.

Accordingly, prior to 1998, while both statutes touched on the same subject, the preparation and procurement of consumer reports, they did not apply to the same types of reports. Compare Cal. Civ. Code § 1785.3(c) with Cal. Civ. Code § 1786.2(c), Stats 1998, c. 988, § 1. Moreover, prior to 1998, a party requesting a 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.

Indeed, if the Legislature intended the ICRAA apply to the employment screening reports previously exclusively subject to the CCRAA, thereby effectively eliminating the CCRAA or eviscerating it to the point it only applied to consumer reports the ICRAA expressly excluded, it would have amended the CCRAA and removed its pre 2011 language stating it applies to all consumer reports used for "employment purposes" so long as they do not "contain[] 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). At minimum, the Legislature would have replaced the CCRAA's limiting language, with language stating it only applied to reports that were expressly excluded from the ICRAA. The Legislature however, did not.

The fact the Legislature did not, shows it did not intend to reduce the CCRAA's scope when it amended the ICRAA in 1998. *Woosley v. State of California* (1992) 3 Cal.4th 758, 775-776. **Moreover, the fact the Legislature has still not amended the CCRAA in this manner despite the extensive litigation involving the unconstitutional overlap between it and the ICRAA shows it intended the two statutes to have continuing separate spheres of application.**

Furthermore, California's Legislature amended the CCRAA in 2011, in an apparent attempt to redraw the distinction between it and the ICRAA. See Cal. Civ. Code § 1785.20.5. At the time First requested the background report on Ms. Connor, the CCRAA stated, in pertinent part:

> Prior to requesting a consumer credit report for employment purposes, the user of the report shall provide written notice to the person involved. The notice shall inform the person that a report will be used, and the source of the report, and shall contain a

> box that the person may check off to receive a copy of the credit report.

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

In 2011, the Legislature amended this section to now read:

> Prior to requesting a consumer credit report for employment purposes, the user of the report shall provide written notice to the person involved. The notice shall inform the person that a report will be used, and shall identify the specific basis under subdivision (a) of Section 1024.5 of the Labor Code for use of the report. The notice shall also inform the person of the source of the report, and shall contain a box that the person may check off to receive a copy of the credit report.

Cal. Civ. Code § 1785.20.5(a).

At the same time in 2011, the Legislature added Labor Code section 1024.5, which purports to limit the permissible purposes for which a consumer credit report for employment purposes can be requested under the CCRAA. Cal. Labor Code § 1024.5. Had the Legislature intended the CCRAA and the ICRAA to overlap by passing the 1998 amendments, or had it intended the ICRAA to subsume the CCRAA, it would not have amended Section 1785.20.5 as it did, or passed Labor Code section 1024.5. *Woosley*, 3 Cal.4th 775-776. Ms. Connor does not effectively argue otherwise. (Answering Brief, pp. 34-35.)

### C. Ms. Connor's Argument That The Legislature Intended The Overlap Violates The Well-Established Rules Of Statutory Construction.

Ms. Connor acknowledges, as she must, that statutes "are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional." *Erlich v. Municipal Court* (1961) 55 Cal.2d 553, 558; *Lockheed*, 28 Cal.2d at 484. She also admits a statute's various components should be read together to achieve the Legislation's overriding

purpose. *Elsner v. Uveges* (2004) 34 Cal.4th 915, 933. Effect should be given to the entire statute and in a manner that would not render any part of the statute meaningless or extraneous or suggest that the Legislature "engaged in an idle act." Cal. Code Civ. Proc. § 1858; *Woosley*, 3 Cal.4th at 775-776.

Moreover, she also agrees that, in interpreting a statutory scheme, the statute's structure and purpose must be considered. "The meaning of a statute may not be determined from a single word or sentence." *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 659. Rather, "the words of a statute [must be construed] in context, . . . harmoniz[ing] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487. Applying Ms. Connor's interpretation of the post-1998 ICRAA however, would violate these provisions as it would result in rendering the CCRAA "superfluous." The CCRAA's plain language allows a party to request a background report for employment purposes such as First did in this action.

Finding that First violated the ICRAA when it requested the background reports in compliance with the CCRAA would render the CCRAA meaningless as to the entire universe of background reports that were not specifically included in its provision or specifically excluded from the ICRAA. If the Legislature had intended this result, it would have amended the CCRAA accordingly. As it did not, and has not to date, it clearly did not intend to do so.

Moreover, even if the Legislature intended the CCRAA and the ICRAA to apply to the same background reports at the same time as Ms. Connor contends, the manner by which it allegedly attempted to achieve this goal does not render the ICRAA any less unconstitutional. The test for whether a statute is unconstitutionally vague is not whether the Legislature intended it be so, but whether the statute provides adequate notice of what it prohibits or requires. *Roberts*, 468 U.S. at 629. As established above, the post 1998 ICRAA did not provide First notice that it was required to comply with ICRAA's provisions when

requesting the subject background reports as permitted by the CCRAA. It is this failure that causes the ICRAA to be unconstitutionally vague.

A reasonable interpretation of the CCRAA and the ICRAA that would not render either unconstitutional or impermissibly superfluous would be to find they applied to different types of reports, as the Legislature clearly intended.

### D. First Did Not Violate The ICRAA Under A Reasonable Interpretation Of Its 1998 Amendment.

Ms. Connor ignores First's reasonable interpretation of the post 1998 ICRAA. Rather, she makes the meritless argument that "First did not raise this argument in the Superior Court. Therefore it has been waived." (Answering Brief, p. 35.) Ms. Connor however, fails to acknowledge this waiver rule does not apply where the facts are not disputed and the issue merely raises questions of law. *Tyre v Aetna Life Ins. Co.* (1960) 54 Cal.2d 399, 405 ("Defendant has been permitted to raise this issue for the first time in this court because the facts are not disputed and the issue merely raises a new question of law"); see also 9 Witkin Cal. Proc. 5th (2008) Appeal, § 406. Ms. Connor admits "[t]he facts of this case are largely undisputed" and "[t]he interpretation of a statute and the determination of its constitutionality are questions of law." (Answering Brief, pp. 3, 4.) Her contention that First waived this argument is therefore without merit.

First's interpretation of the post 1998 ICRAA in the manner that gives effect to the amendment and does not render the CCRAA superfluous is also not an extreme limitation. Indeed, it comports with the Legislature's intent to keep the CCRAA and ICRAA separate and distinct.

Applying the well settled rules of statutory construction, the most reasonable interpretation of the post 1998 ICRAA's definition of an "investigative consumer report" would be one where the report contains non-public information regarding an individual obtained from persons who are acquainted with the individual "by any means" rather than only through "personal interviews." This interpretation continues to give effect to the Legislature's intent to differentiate

between consumer reports subject to the CCRAA and those subject to the ICRAA by differentiating the reports by the manner in which the information contained in them is collected. This interpretation also comports with the rule of statutory construction to avoid an interpretation that renders any language in either statute superfluous. *Erlich v. Municipal Court* (1961) 55 Cal.2d 553, 558; *Lockheed*, 28 Cal.2d at 484.

Finally, Ms. Connor's argument that "[t]here is not support for First's contention that post 1998 ICRAA is limited to background check reports that contain non-public information" is incorrect. (Answering Brief, p. 35.) First cited to the *Ortiz* Court's recognition that it appeared California's Legislature amended the ICRAA in 1998, in response to the *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548 decision. *Ortiz*, 157 Cal.App.4th at 617. California's Legislature amended the ICRAA in 1998, by replacing its "personal interview" limitation in its definition of an "investigative consumer report" with the "through any means" language after *Cisneros*. The timing of the amendment leads to the conclusion it did in an effort to broaden the ICRAA's coverage for reports containing non-public information - *i.e.* personal information that could only be obtained from individuals who are acquainted with the subject of the report - so that it was not limited to situations where the interviews were conducted "in person."

The Legislature's intent to do so is also shown by the fact it did not amend the CCRAA at the same time or amend the CCRAA's limitation on reports subject to its provision – *i.e.* those where the report contains information obtained through "personal interviews." This shows the Legislature did not intend to eviscerate or otherwise limit the CCRAA's scope but intended only to expand the ICRAA's definition of the term "personal interviews." *Woosley*, 3 Cal.4th at 775-776.

Interpreting the post 1998 ICRAA to mean an "investigative consumer report" is one where the report contains non-public information

regarding an individual obtained from persons who are acquainted with the individual "by any means" establishes the subject background reports are not "investigative consumer reports" as a matter of law. It is undisputed that Ms. Connor's background reports only contained information taken from public records. (JA, Vol. IV, pp. 951-952.) They did not contain any private information not contained in publically available sources or any information obtained from personal interviews. (Id.) Indeed, the Second Appellate District held such. *Connor*, 239 Cal.App.4th at 535. Accordingly, First should not be found to have violated the ICRAA.

### E. Ms. Connor Has Not Cited Any Case Law Or Other Legal Authority Supporting Her Position That First Can Be Held Legally Liable For Engaging In Legal Conduct.

Ms. Connor's briefs in this Court and the courts below are devoid of any legal authority supporting her position that First can be held liable for engaging in conduct expressly permitted by the CCRAA. Rather, Ms. Connor and the Court below relied on cases that are inapposite to the instant action. They are therefore not authority for the proposition that First can be found liable for the ICRAA's $10,000 penalty for requesting a background report in accordance with the CCRAA. *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372 ("cases are not authority for propositions not considered therein").

Specifically, Ms. Connor's citations to *Connecticut National Bank v. Germain* (1992) 503 U.S. 249 and *J.E.M. AG Supply, Inc. v. Pioneer Hi-Breed International, Inc.* (2001) 534 U.S. 124, which use the term "positive repugnancy", are inapposite to this action. The *Connecticut National Bank* Court held the two statutes at issue, two jurisdictional statutes - 28 U.S.C. §§ 1291 and 1292 and 28 U.S.C. § 158 - did not overlap because "each section confer[ed] jurisdiction over cases that the other section does not reach." *Connecticut National Bank*, 503 U.S. at 253. Unlike *Connecticut National Bank*, the *Connor* Court specifically found the subject background reports were simultaneously

subject to the CCRAA and the ICRAA. *Connor*, 239 Cal.App.4th at 534. Plaintiff does not argue how or why this case is applicable to this action given this distinction.

Moreover, the *Connecticut National Bank* Court stated "[r]eduncies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, [] a court must give effect to both" **to avoid "render[ing] one or the other wholly superfluous.**" *Connecticut National Bank*, 503 U.S. at 253. [emphasis provided] As First established in is Opening Brief, finding the CCRAA and the ICRAA did not unconstitutionally overlap would result in rendering the CCRAA improperly "superfluous." This is because the CCRAA allows a party to request a background report for employment purposes. If the CCRAA and the ICRAA did not unconstitutionally overlap, that portion of the CCRAA authorizing a party to obtain background reports for employment purposes that are not expressly excluded from its coverage and in compliance with its requirements would be rendered superfluous. Accordingly, *Connecticut National Bank* actually supports First's position.

As First established in its Opening Brief, *J.E.M. Ag Supply, Inc.* is also inapposite to this case. The *J.E.M* Court considered the interrelationship between a utility patent issued under 35 U.S.C.S. §§ 101-103 and a plant variety protection certificate under 7 U.S.C.S. §§ 2402 ("PVP")/the Plant Variety Protection Act 7 U.S.C.S § 2321 et seq. ("PVPA"). The Court held there was no impermissible overlap between the utility patent statute and the PVP/PVPA because each statute addressed different subjects. Specifically, the Court stated:

> To be sure, there are differences in the requirements for, and covered or, utility patents and plant variety certificates issued pursuant to the PVPA. These differences, however, do not present irreconcilable conflicts because the requirements for obtaining a utility patent under § 101 are more stringent than those for obtaining a PVP certification, and the protections afforded by a utility patent are greater than those

> afforded by a PVP certificate. Thus, there is a parallel relationship between the obligations and the level of protection under each statute.

*Id.* at 142; see also *Id.* at 143-144 ("[f]or all of these reasons, it is clear that there is no 'positive repugnancy' between the issuance of utility patents for plants and PVP coverage for plants. . . . Here we can plainly regard each statute as effect because of its different requirements and protections").

In this action, the CCRAA and the ICRAA cover the exact same subject matter. Neither however, provides any notice that a party needs to comply with the ICRAA when requesting a background report as authorized by the CCRAA. Accordingly, as applied to consumer reports that are potentially within the ambit of both the CCRAA and the ICRAA, the post 1998 ICRAA violates the core tenant of due process. *Roberts*, 468 U.S. at 629. Ms. Connor has not established otherwise.

*Alexander v. Gardner-Denver* (1974) 415 U.S. 36 is also inapposite to this action. The Alexander Court considered whether an employee waived his right to sue his employer in court for alleged unlawful discrimination when he previously filed a grievance for the same conduct pursuant to a collective bargaining agreement and received an adverse ruling from the arbitrator. *Id.* at 46-47. The Alexander Court stated "[i]n addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Id.* In other words, the legislative enactments provide parallel or overlapping remedies for the same wrongful acts. The *Alexander* Court did not state a statute can constitutionally make illegal conduct expressly authorized by another as Ms. Connor attempts to do in this case.

Ms. Connor's reliance on *United States v. Batchelder* (1979) 442 U.S. 114; *Arias v. Superior Court* (2009) 46 Cal.4th 969; *Brown v. Superior Court* (1984) 37 Cal.3d 477, 486; *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 986; and *Sanchez v. Swissport* (2013) 213 Cal.App.4th 1331 is also misplaced as these cases all state the same conduct may implicate more and one statute. *Batchelder*, 442 U.S. at 114 (finding no due process violation when the same conduct violated multiple statutes); *Arias*, 46 Cal.4th at 969 (the same conduct that may violate California's Private Attorneys' General Act may also constitute a predicate violation for a cause of action under California Business and Professions Code section 17200); *Brown*, 37 Cal.3d at 486 ("employment discrimination cases, by their very nature, involve several causes of action arising from the same set of facts"); *Chavez*, 47 Cal.4th at 970 (finding "no irreconcilable conflict between section [Cal. Code Civ. Proc. §] 1033(a) and the FEHA's attorney fee provision"); *Sanchez*, 213 Cal.App.4th at 1338-1339 ("the PDLL, which makes clear that its remedies augment, rather than supplant, those set forth elsewhere in the FEHA. By its terms, the PDLL provides that its remedies are '[i]n addition to" those governing pregnancy, childbirth, and pregnancy-related medical conditions set forth in the FEHA, including section 12940'").

None of these cases stand for the proposition Ms. Connor asserts in this action, that First can be held liable for violating the ICRAA on statute when engaging in conduct specifically authorized by the CCRAA, even though neither the CCRAA nor the ICRAA provided any notice it was required to comply with both. They do not because this is not the law.

## III.

## CONCLUSION

As First established in its Opening Brief 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

was required, or potentially required, to comply with the ICRAA. Ms. Connor's attempt to hold First 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: March 28, 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 6,645 words in 13-point Times New Roman type as counted by the word-processing program to generate the text.

Dated: March 28, 2016

LITTLER MENDELSON, PC

By: _____

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## PROOF OF SERVICE BY OVERNIGHT MAIL

I am employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 50 W. San Fernando, 15th Floor, San Jose, California 95113.2303. On March 28, 2016, I served via Federal Express overnight mail:

**FIRST STUDENT, INC. AND FIRST TRANSIT, INC.'S REPLY BRIEF ON THE MERITS**

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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 March 28, 2016, at San Jose, California.

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