In the Supreme Court of the State of California

EILEEN CONNOR, **Plaintiff and Appellant,** **v.** **FIRST STUDENT, INC., et al.,** **Defendants and Respondents.**	Case No. S229428

Second Appellate District, Division Four, Case No. B256075
Los Angeles County Superior Court, Case No. JCCP 4624
Honorable John S. Wiley, Judge

AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF AND APPELLANT

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INTRODUCTION AND STATEMENT OF INTEREST

Consumer reporting agencies and the reports they prepare are unavoidable facts of modern life for millions of California consumers. Once used primarily to determine a consumer's creditworthiness when seeking a loan, the information reported by these agencies today is increasingly used not just by lenders, but also by employers, landlords, and insurers. Now, negative information in a consumer report means that the consumer might be fired, never hired, go uninsured, or be unable to find a place to live. While these reports can have a significant impact on consumers' lives, they often contain wrong information, primarily due to identity theft and reporting agency error.

To protect consumers from the potentially devastating effects of mistakes in consumer reports, the California Legislature enacted, and has twice expanded, the Investigative Consumer Reporting Agencies Act (ICRAA). The Act regulates investigative consumer reports and the agencies that prepare those reports for use by employers, insurers, or landlords. Among other things, it requires agencies to ensure the accuracy of each report they compile, and mandates disclosure to consumers to allow them to discover and correct errors that may, through no fault of their own, prevent them from getting a job, insurance, or an apartment. The ICRAA complements the protections of the Consumer Credit Reporting Agencies Act (CCRAA), which regulates credit reporting agencies and consumer credit reports used to determine a consumer's creditworthiness.

The ICRAA's consumer protections are clearly stated in the Act. All employers, landlords, or insurers who commission investigative consumer reports, as well as the reporting agencies that compile them, can easily determine the scope of the ICRAA and comply with its requirements. Where a consumer report triggers the protections of both the ICRAA and the CCRAA, the entity who orders the report can—and must—comply with

both acts by meeting the stricter disclosure requirements of the ICRAA.[1] California consumers are entitled to the full protection of both laws.

The Attorney General, as the State's chief law enforcement officer, is responsible for enforcing state law, including laws regulating consumer reporting agencies. The Attorney General's Office regularly receives consumer complaints regarding both identity theft and errors in consumer reports—which have been especially apparent in the Attorney General's efforts to remediate foster youth credit reports. The ICRAA provides vital protections for consumers in these circumstances—protections the Legislature intended them to have—and gives law enforcement a tool to regulate consumer reporting agencies and a means of discovering criminal identity theft. The Attorney General has an interest in ensuring that the ICRAA is properly construed and upheld against unwarranted challenges to its constitutionality. Attorney General Kamala D. Harris submits this amicus curiae brief pursuant to California Rules of Court, rule 8.520(f), presenting additional arguments in support of plaintiff regarding the importance and constitutionality of the Investigative Consumer Reporting Agencies Act.

ARGUMENT

The Attorney General agrees with plaintiff that this Court should affirm the decision of the Court of Appeal and joins her argument regarding the constitutionality of the ICRAA. (See Answer Brief on the Merits of Plaintiff and Appellant, filed Feb. 19, 2016 ["Answer Br."], at pp. 14-30.) The Attorney General writes separately to provide the Court with additional

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[1] As Defendants discuss in their opening brief, the disclosure requirements of the ICRAA are more comprehensive than the disclosure requirements of the CCRAA. (First Student, Inc. and First Transit, Inc.'s Opening Brief on the Merits, filed Jan. 20, 2016 ["Opening Br."], at pp. 15-16.)

context on the crucial consumer protections provided by the ICRAA and the constitutionality of that Act.

I. THE INVESTIGATIVE CONSUMER REPORTING AGENCIES ACT PROVIDES CRUCIAL PROTECTIONS TO CONSUMERS

A. Inaccurate Investigative Consumer Reporting Hurts Consumers

Investigative consumer reporting agencies play a "vital role" and exercise "grave responsibilities" in decision-making that impacts fundamental aspects of a consumer's life and livelihood. (Civ. Code, § 1786, subds. (a), (b)[2].) Mistakes in investigative consumer reports can have "a potentially devastating impact on an individual's life." (Assem. Com. On Consumer Protection, Governmental Efficiency, and Economic Development, Hearing on Sen. Bill No. 1454 (1997-1998 Reg. Sess.) June 23, 1998, p. 3 [attached to Plaintiff and Appellant Eileen Connor's Motion for Judicial Notice ("Plaintiff's MJN") as Exh. J][3].) False information "can plague a victim for years, impeding his or her ability to find or keep a job or obtain other services . . . ." (Sen. Jud. Com., Analysis of Assem. Bill No. 655 (2001-2002 Reg. Sess.) as amended Aug. 20, 2001, p. 9.)

For example, errors in investigative consumer reports can impact a consumer's access to housing. In the case of Ms. Quida Johnson, a consumer reporting agency "erroneously identified her as having been

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[2] All statutory references in this brief are to the California Civil Code unless otherwise noted.

[3] The legislative history documents cited in this brief constitute "published" legislative bills, enrolled bill reports, and committee and floor analyses. Judicial notice of these documents is unnecessary. (See *Sharon S. v. Superior Court (Annette F)* (2003) 31 Cal.4th 417, 440, fn.18 [73 P.3d 554]; *Quelimane Company Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46, fn.9 [960 P.2d 513].) For the Court's ease of reference and convenience, however, the Attorney General provides cross-citations to Plaintiff and Appellant's Motion for Judicial Notice, where available.

involved in two unlawful detainers, based solely on the similarity of her name and the name of the defendant in the unlawful detainer actions," even though her address did not match the address of the individual reportedly involved in the eviction actions. (*Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 573-575 [46 Cal.Rptr.2d 233].) Without verifying or even checking the information, the agency reported both evictions to the landlord considering Ms. Johnson's application for subsidized housing. (*Id.* at p. 573.)

Errors in investigative reports can also cost consumers jobs. The Senate Judiciary Committee noted the case of Mr. Bronti Kelly, who suffered an extended period of unemployment due to mistakes in an investigative report. For three years, Mr. Kelly "was denied job after job, with no explanation." (See Sen. Jud. Com., Analysis of Sen. Bill No. 1454 (1997-1998 Reg. Sess.) as amended April 27, 1998, p. 4 [attached to Plaintiff's MJN as Exh. J].) He finally learned that an investigative reporting agency had compiled a report on him, containing the criminal record of a thief who had stolen his wallet. "This information was never verified by the agency, yet used by each company he interviewed with to deny him employment." (*Ibid.*)

B. Consumer Reports Often Contain Errors Through No Fault of the Consumer and Without the Consumer's Knowledge

The devastating impact of an inaccurate investigative consumer report is especially unjust given that, in most cases, the consumer is not the source of the mistakes. Inaccurate information appears in these reports generally due to identity theft and reporting agency errors. Often, the consumer is unaware of the inaccurate information, which compounds the harm.

Identity theft occurs when a criminal takes personal information, such as a consumer's name, Social Security number, or financial account

number, and uses it for unlawful purposes such as opening new credit accounts, taking out loans, or committing crimes (and generating criminal records in the consumer's name). As the Legislature recognized when it amended the ICRAA in 2001, "[t]he crime of identity theft in this new computer era has exploded to become the fastest growing white collar crime in America." (Civ. Code, § 1786, subd. (c).) The Legislature estimated that there would be "600,000 to 800,000 victims of this crime nationwide in 2001." (Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 655 (2001-2002 Reg. Sess.) Sept. 17, 2001, p. 3.) Thirteen years later, that number had increased thirty fold; in 2014, there were an estimated 17,600,000 victims of identity theft nationwide. (U.S. Bureau of Justice Statistics, Victims of Identity Theft, 2014 (Sept. 2015) p. 1 at <http://www.bjs.gov/content/pub/pdf/vit14.pdf> [as of April 21, 2016] ["2014 BJS Report"][4].) That accounts for 7% of all U.S. residents age 16 or older, resulting in one identity theft victim every 1.8 seconds. (*Ibid.*)

Identity theft can be catastrophic for its victims. It "can interfere with a victim's ability to obtain or keep employment, buy insurance, or even rent an apartment." (Sen. Jud. Com., Analysis of Assem. Bill No. 655 (2001-2002 Reg. Sess.) as amended Aug. 20, 2001, p. 1.) Identity theft is often difficult to remedy, with victims spending an estimated 175 hours, on average, to restore their identities and repair their consumer reports. (Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 655 (2001-2002 Reg. Sess.) Sept. 17, 2001, p. 3.) Identity theft is also expensive. In 2014,

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[4] Under Evidence Code § 452, the Court may take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Cal. Evid. Code § 452(c).) "Official acts include records, reports, and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518 [104 Cal.Rptr.2d 439].)

the majority of the 17.6 million victims reported a direct financial loss as a result of identity theft, with an average loss of $1,343. (2014 BJS Report, at p. 6.) That year, identity theft resulted in a cumulative loss of $15.4 billion—$28,538 each minute. (*Id.* at p. 7.) Disturbingly, "the unique nature of this crime means it can often go undetected for years without the victim being aware his identity has been misused." (Civ. Code, § 1786, subd. (d).) During this time, victims' identities continue to be misused, their records are further damaged, and their financial losses mount.

Inaccuracies in consumer reports due to identity theft present a significant enough problem that when the Legislature amended the ICRAA in 2001, it required agencies to provide a disclaimer on the first page of every investigative consumer report "setting forth that the report does not guarantee the accuracy or truthfulness of the information as to the subject of the investigation, but only that it is accurately copied from public records, and information generated as a result of identity theft . . . may be inaccurately associated with the consumer who is the subject of the report." (Civ. Code, § 1786.29, subd. (a).)[5]

Identity theft, however, is not the only source of inaccurate information in consumer reports. Reporting agencies themselves routinely make mistakes and include wrong information about consumers in their reports. A 2012 Federal Trade Commission study of 1,001 randomly selected consumers found that more than 26% of respondents identified potentially material errors in one or more of their consumer reports. (Federal Trade Commission, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (2015) p. i at

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[5] The very existence of this provision confirms that the Legislature intended the ICRAA to apply to reports containing public record information, contrary to Defendants' suggestion. (See Opening Br. at pp. 41-44.)

<https://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf> [as of April 21, 2016].)

The impact of inaccurate information in investigative consumer reports is often compounded because the consumer "remains completely in the dark about the root of the problem." (Sen. Jud. Com., Analysis of Assem. Bill No. 655 (2001-2002 Reg. Sess.) as amended Aug. 20, 2001, p. 9.) Unlike the well-known use of credit reports by banks and other lenders, many consumers are unaware that investigative consumer reports are routinely used to make decisions regarding jobs, housing, and insurance. As the Legislature acknowledged, "Many employers, insurance agencies, and apartment managers conduct background checks through private investigative consumer reporting agencies (ICRAs) and turn down applicants with bad reports without telling them why. As a result, victims may face months or years of frustration in finding a job, or may fail to obtain insurance or a place to live, without realizing that credit reports falsely portraying them as deadbeats or criminals are the source of the problem." (*Id.* at pp. 1-2.)

C. By Mandating Disclosure to Consumers, the ICRAA Helps Ensure Accuracy of Investigative Reports

To help protect consumers from harm arising from identity theft and reporting agency errors, both of California's consumer reporting statutes—the ICRAA and the CCRAA—require agencies to "adopt reasonable procedures for meeting the needs of commerce . . . in a manner which is fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy and proper utilization of the information. . ." (Civ. Code, § 1786, subd. (b); § 1785.1, subd. (d).) These procedures allow the consumer to examine and dispute the accuracy of information in their files,

and limit the circumstances in which agencies may furnish reports to the creditors, employers, landlords, and insurers that request them.

The ICRAA requires more disclosure than the CCRAA because many consumers are not aware of the routine use of investigative consumer reports and it is much more difficult for consumers to access investigative consumer reports about themselves than it is to access consumer credit reports. Federal law requires the three major credit reporting agencies to maintain a centralized website, AnnualCreditReport.com, where consumers can get copies of their consumer credit reports and dispute any errors they find before applying for credit. (See 15 U.S.C. § 1681j, subd. (a).) In this way, consumers can ensure that their credit applications will not be unfairly denied, delayed, or otherwise hampered by inaccurate information.[6] But there are hundreds of reporting agencies that provide investigative consumer reports, and there is no central location where consumers can access those reports. Absent the ICRAA, a consumer would have no ability to discover which one of these myriad reporting agencies an insurer, landlord, or employer might use, what kind of information that agency reports, or what records the agency has regarding the consumer.

The ICRAA ensures that a job, insurance, or housing applicant finds out that an investigative report has been ordered, and from which reporting agency. The ICRAA requires an employer, insurer, or landlord to identify

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[6] In fact, the Federal Trade Commission recommends this procedure: "Consumers concerned that their credit reports may contain errors should continue to examine their credit reports regularly through the use of https://www.annualcreditreport.com . . . " (Federal Trade Commission, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (2012) p. 64 at <https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf> [as of April 21, 2016].)

the name and address of the agency used, describe the nature and scope of the investigation requested, explain the applicant's right to review the agency's files and information about the applicant, and give the applicant an opportunity to request a copy of the actual report the employer, insurer, or landlord will see. (Civ. Code, § 1786.16.) An employer ordering an investigative report for employment purposes must also disclose the agency's website and telephone number, and may not procure the report until the applicant has authorized it in writing. (Civ. Code, § 1786.16, subd. (a)(2).) Further, the ICRAA requires the reporting agency itself to provide a copy of investigative reports to the consumer upon request. (Civ. Code, § 1786.11.) Each investigative consumer reporting agency must also allow a consumer to view any files it has concerning that consumer, and provide a written explanation of any coded information. (Civ. Code, §§ 1786.10, 1786.22.) To ensure proper and timely disclosure to consumers, the ICRAA prohibits investigative reporting agencies from even preparing a consumer report until the employer, insurer, or landlord certifies it has made the required disclosures to the consumer and the consumer has been informed of the report. (Civ. Code, § 1786.12, subd. (e).)[7]

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[7] The ICRAA explicitly does not impact the ability of government agencies to run background checks for law enforcement or licensing purposes. (See Civ. Code § 1786.2(d) [stating that the term "investigative consumer reporting agency" "does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes. . ."].) For example, the California Department of Motor Vehicles requires each school bus driver to have a valid school bus driver certificate issued by the California Highway Patrol, which the driver can obtain only by passing a fingerprint-based criminal background check. (See Cal. Veh. Code § 12517, subd. (a)(2) [requiring certificate]; Cal. Veh. Code § 12517.3, subd. (a)(1) ["An applicant for an original certificate to drive a schoolbus [or] school pupil activity bus . . . shall be fingerprinted by

(continued...)

Violation of any of these disclosure provisions subjects an investigative reporting agency—or a landlord, employer, or insurer ordering a report—to potentially significant penalties. The ICRAA establishes a minimum recovery of $10,000 for any consumer harmed by an agency's or a user's violation of its disclosure requirements. (Civ. Code, § 1786.50, subd. (a).) The ICRAA also allows the court to award punitive damages for willful or grossly negligent violation of the statute. (Civ. Code, § 1786.50, subd. (b).) These penalties are intentionally serious: prior penalties were simply "not a sufficient incentive to insure accuracy." (Sen. Jud. Com., Analysis of Sen. Bill No. 1454 (1997-1998 Reg. Sess.) as amended April 27, 1998, p. 4 [attached to Plaintiff's MJN as Exh. J].)

By mandating "disclosure, disclosure, disclosure[,]" and bolstering its disclosure requirements with significant potential penalties, the ICRAA "strengthen[s] consumers' rights to have only accurate information collected about them," and helps consumers protect themselves. (Sen.

(...continued)
the Department of the California Highway Patrol. . ."]; Cal. Veh. Code, § 12517.4, subd. (b) ["A temporary driver certificate shall be issued by the Department of the California Highway Patrol after an applicant has cleared a criminal history background check by the Department of Justice. . ."]; Cal. Veh. Code, § 12517.4, subd. (c) ["A permanent driver's certificate shall be issued by the department after an applicant has passed all tests and met all applicable provisions of this code."].) Such certificates are "valid for a maximum of five years," at which point a school bus driver must re-apply and re-submit to the fingerprint-based criminal background check. (Cal. Veh. Code, § 12517.4, subd.(c).) Further, the California Department of Motor Vehicles "may suspend or revoke a schoolbus [or] school pupil activity bus [certificate] . . . if any of the following causes apply to the applicant or certificate holder," which may be discovered through ongoing criminal record review by the Department of Justice: conviction of a felony; commission of an act of moral turpitude; dismissal for a cause related to transportation safety; or conviction of an offense related to the use, sale, or possession of narcotics or dangerous drugs. (See Cal. Veh. Code, § 13370, subd. (b).)

Rules Com., Off. of Sen. Floor Analyses, Bill Analysis, Senate Bill No. 1454 (1997-1998 Reg. Sess.), as amended June 18, 1998, at p. 7; Assem. Com. On Consumer Protection, Governmental Efficiency, and Economic Development, Hearing on Sen. Bill No. 1454 (1997-1998 Reg. Sess.) June 23, 1998, at p. 2 [both attached to Plaintiff's MJN as Exh. J].)

The ICRAA's disclosure requirements afford victims of identity theft a better chance to catch the crime early. Because notice of identity theft is "critical" to the victim's ability to stop and prosecute the crime, the Legislature declared that "consumers are best protected if they are automatically given copies of any investigative consumer reports made on them." (Civ. Code, § 1786, subd. (e).) The disclosure requirements also help a job, insurance, or housing applicant discover inaccuracies in her file that might impact her application, and allow her to address inaccuracies timely and directly with the reporting agency and the employer, insurer, or landlord. As the Legislature explained, "greater disclosure means greater accuracy." (Sen. Jud. Com., Analysis of Sen. Bill No. 1454 (1997-1998 Reg. Sess.) as amended April 27, 1998, p. 4 [attached to Plaintiff's MJN as Exh. J].) The ICRAA's disclosure requirements thereby help to minimize occurrences in which an applicant is denied a job, insurance, or a place to live based upon wrong information of which she was completely unaware.

The ICRAA, then, enables consumers to ensure the accuracy of reports about them, to safeguard their privacy, and to discover and protect themselves from identity theft. The Act also provides the Attorney General and county and local prosecutors an important tool both to ensure that investigative reporting agencies fulfill their legal obligations to California consumers, and to identify and prosecute perpetrators of identity theft.

The Legislature added the ICRAA's stricter disclosure requirements and penalties in 1998 and 2001 specifically to "protect individuals from inaccurate and false information contained in consumer investigative

reports, which increasingly are used to determine employment, insurance and housing eligibility." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading of Sen. Bill No. 1454 (1997-1998 Reg. Sess.) as amended Aug. 24, 1998, p. 2 [attached to Plaintiff's MJN as Exh. J].) According to the *Ortiz* court, the Legislature's 1998 revisions to the statute made it unconstitutional. (*Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604, 619 [69 Cal.Rptr.3d 66].) But it would be a perverse—and wrong—result if by progressively and intentionally "expand[ing] the rights and protections afforded to consumers who are the subject of investigations," the Legislature actually rendered all of the ICRAA's crucial consumer protections invalid. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading of Assem. Bill No. 655 (2001-2002 Reg. Sess.) as amended Aug. 28, 2001, p. 1.)

II. THE INVESTIGATIVE CONSUMER REPORTING AGENCIES ACT IS CONSTITUTIONAL

A statute is not unconstitutionally vague where it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [92 S.Ct. 2294, 33 L.Ed.2d 222].) "[E]conomic regulation" of the type at issue in this case "is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 498-499 [102 S.Ct. 1186, 71 L.Ed.2d 362] [applying a less strict vagueness test to a licensing and marketing ordinance that "simply regulates business behavior"].) (See also *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 162 [92 S.Ct. 839, 31 L.Ed.2d 110] [noting in dictum that "greater

leeway is allowed" regarding fair notice for "regulatory statutes governing business activities"].)

The ICRAA is not vague under these standards. The Act clearly sets out its scope, and adequately informs reporting agencies, employers, landlords, and insurers of the consequences for not following the law. There is no "void for overlap" standard, and the ICRAA is not rendered vague or unconstitutional merely because its scope partially overlaps with the CCRAA.

A. The ICRAA Clearly Sets Out its Scope, Requirements, and Penalties

Agencies and potential users of investigative reports (i.e., employers, landlords, and insurers) can determine whether a particular consumer report is subject to the ICRAA through a simple two-step inquiry.

Step One: What is the purpose of the report? If the employer, insurer, or landlord plans to commission a report about a consumer in order to evaluate the consumer's application for employment, insurance, or rental housing, then the ICRAA may apply and the user should proceed to step two. (Civ. Code, § 1786.2, subd. (b) [a "consumer" within the meaning of the ICRAA is an individual "who has made application to a person for employment purposes, for insurance . . . or the hiring of a dwelling unit . . . "].)

Step Two: What information is sought in the report? If the employer, insurer, or landlord ordering the report (i.e., the user) seeks only factual information relating to the consumer's credit record that has been obtained directly from a creditor, credit reporting agency, or the consumer herself, then the user need not comply with the ICRAA. The ICRAA expressly excludes reports consisting solely of this type of information. (Civ. Code § 1786.2, subd. (c).) If, however, the user seeks—and, therefore, the report will contain—any other information, obtained by any means,

then the user must comply with the ICRAA before ordering the report. (See, e.g., Civ. Code, § 1786.18 [explicitly regulating certain items of information that may be compiled in investigative consumer reports, including: bankruptcies, lawsuits, judgments, unlawful detainer actions, tax liens, accounts placed for collection, arrest records, indictments, convictions, and "[a]ny other adverse information"].)

If the purpose and information sought by the employer, landlord, or insurer are both covered by the ICRAA, the user must—before ordering the report—disclose to the consumer, in writing: (a) that an investigative consumer report may be obtained; (b) the permissible purpose of such report; (c) that the report may include information about the consumer's character, general reputation, personal characteristics, and mode of living; (d) the name, address, and telephone number of the investigative consumer reporting agency preparing the report; and (e) the nature and scope of the investigation requested. (Civ. Code, § 1786.16, subd. (a).) If the report is sought for employment purposes, then the consumer must specifically authorize its procurement. (Civ. Code, § 1786.16, subd. (a)(2)(C).)

Defendants accurately identify each of these disclosure requirements in their opening brief. (See Opening Br. at p. 16.) Defendants also accurately explain the penalties for violation of the ICRAA disclosure provisions. (*Id.* at p. 17.) Defendants' ability to understand and accurately interpret the law demonstrates that the ICRAA provides businesses with a "reasonable opportunity to know what is prohibited, so that [they] may act accordingly." (*Grayned v. City of Rockford*, *supra*, 408 U.S. at p. 108.)

B. Overlap with the Consumer Credit Reporting Agencies Act Does not Make the Investigative Consumer Reporting Agencies Act Vague

It is possible that an employer, landlord, or insurer ordering a consumer report may be required to comply with both the ICRAA and the

CCRAA[8], but that does not make either statute vague. As Plaintiff points out, "[t]here is no 'void for overlap' rule."[9] (Answer Br. at pp. 15, 20-30.) To the contrary, where two statutes overlap in their coverage, a regulated party is expected to know and follow the requirements of both statutes, even if that means applying a higher standard to its conduct. (See, e.g., *Powell v. U.S. Cartridge Co.* (1950) 339 U.S. 497, 519 [70 S.Ct. 755, 94 L.Ed. 1017].) Only if it is impossible to do so (i.e., a party cannot comply with one statute without violating the other), is this overlap problematic.

For example, in *Powell v. U.S. Cartridge Co.*, *supra*, 339 U.S. 497, the Supreme Court considered the applicability of overlapping wage requirements in the Walsh-Healey Act and the Fair Labor Standards Act (FLSA). When plaintiff employees sued for alleged FLSA wage violations, defendant contractors denied liability, claiming that because they operated under the Walsh-Healey Act, which contained specific employee wage requirements, the FLSA wage requirements could not also apply. (*Id.* at p. 519.) The Supreme Court disagreed, finding that "[t]he applicability of the Walsh-Healey Act to the contracts before us [ ] does not preclude the application of the Fair Labor Standards Act to employees under the same contracts." (*Id.* at pp. 519-520.) While defendants had met the wage requirements of the Walsh-Healey Act, they had not met the wage requirements of the FLSA, and the Court declined to absolve defendants

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[8] For example, an employment background report may contain both factual information relating to the consumer's credit record that was obtained directly from a creditor, which falls within the CCRAA's scope, and information about a consumer's criminal record, which falls within the ICRAA's scope. In that situation, the user who orders such report would be required to follow the requirements of both the ICRAA and the CCRAA.

[9] Plaintiff also aptly demonstrates that there is no indication the Legislature intended the ICRAA and the CCRAA to be exclusive. (Answer Br. at pp. 6-10, 21-24.)

from "determining, in each instance, the respective wage requirements under each Act and then applying the higher requirement as satisfying both." (*Id.* at p. 519; see also *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805 [288 P.3d 717] [finding that defendant developer could be subject to three overlapping statutes regulating the same development—the government code defendant claimed exempted it from requirements of other statutes could be construed to require specific hearings "*in addition* to the procedures and hearings required by other state laws"]; *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1335, 1341 [153 Cal.Rptr.3d 367] [even though defendant employer complied with Pregnancy Disability Leave Law, it could still be held liable for failing to comply with potentially more comprehensive pregnancy-related leave requirements under the Fair Employment and Housing Act]; *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 965 [131 Cal.Rptr. 172] [timber harvester who complied with requirements of Forest Practice Act must still meet additional requirements for same project under California Environmental Quality Act because the two statutes "supplement each other and . . . must be harmonized"].)

It is not impossible for a user to determine the disclosure requirements of both the ICRAA and the CCRAA. Nor is it impossible for a user to comply with the disclosure requirements of both the ICRAA and the CCRAA. Therefore, users of consumer reports must comply with both by meeting the ICRAA's stricter disclosure requirements where that Act applies to the user's conduct.

CONCLUSION

The Court should affirm the decision of the Second District Court of Appeal.

Dated: April 26, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF AND APPELLANT EILEEN CONNOR** uses a 13 point Times New Roman font and contains 4,142 words.

Dated: April 26, 2016

KAMALA D. HARRIS
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Attorney General of California

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **EILEEN CONNOR V. FIRST STUDENT, INC., ET AL.**

Case No.: S229428

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On April 26, 2016, I served the attached:

AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF AND APPELLANT

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

[PLEASE SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 26, 2016, at Los Angeles, California.

Edwina Roan-Tuyay
Declarant

Edwina Roan-Tuyay
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