IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 4

EILEEN CONNOR AND JOSE GONZALEZ, Plaintiffs-Appellants, v. FIRST STUDENT, INC.; FIRST TRANSIT, INC.; HIRERIGHT SOLUTIONS, INC.; HIRERIGHT, INC., Defendants-Respondents	Appeal Nos. B256075, B256077 Los Angeles Superior Court No. JCCP 4624 (In re First Student, Inc. Cases) Trial Judge: The Hon. John S. Wiley

APPLICATION TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CALIFORNIA REINVESTMENT COALITION, CONSUMER ACTION, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, HOUSING AND ECONOMIC RIGHTS ADVOCATES, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL HOUSING LAW PROJECT AND PUBLIC GOOD LAW CENTER *IN SUPPORT OF PLAINTIFFS-APPELLANTS*

[Service on Attorney General required pursuant to California Rule of Court 8.29(c)]

SETH E. MERMIN, SBN 189194
THOMAS BENNIGSON, SBN 237804
RACHEL A. FOODMAN
PUBLIC GOOD LAW CENTER
3130 Shattuck Ave.
Berkeley, CA 94705
Telephone: (510) 393-8254
TMermin@publicgoodlaw.org

Counsel for amici curiae

APPLICATION TO FILE *AMICUS* BRIEF

Pursuant to the California Rules of Court, rule 8.520(f), the organizations set forth in the caption and described below respectfully request permission to file the attached brief as *amici curiae* in support of Plaintiffs-Appellants.

This application is timely made, per Rule 8.200(c) of the California Rules of Court and section 12 of the Code of Civil Procedure. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the *amici curiae*, their members, or their counsel in the pending appeal.

I. INTEREST OF *AMICI CURIAE*

The proposed *amici curiae* – California Reinvestment Coalition, Consumer Action, Consumers for Auto Reliability and Safety, Housing and Economic Rights Advocates, National Association Of Consumer Advocates, National Employment Law Project, National Housing Law Project and Public Good Law Center – constitute a diverse group of public interest organizations dedicated to protecting and vindicating the rights of Californians in fields of law ranging from automobile sales to housing, from employment to consumer finance. As detailed in the Statement of Interest of Amici

Curiae in the accompanying brief, the proposed *amici* represent a great breadth of experience and variety of expertise across a range of subject matter areas. What the proposed *amici* all share, however, is a commitment to the ideas (1) that California needs a robust consumer reporting regime and (2) that the reasoning in *Ortiz v. Lyon Mgmt. Grp., Inc.* (2007) 157 Cal.App.4th 604 not only threatens that regime but would also, if extended, wreak havoc in fields across the spectrum of law. If laws that are *in pari materia* are unconstitutionally vague simply because they apply to the same conduct, then vast numbers of laws in the areas in which the proposed *amici* practice will effectively be rendered void.

II. NEED FOR FURTHER BRIEFING

The proposed *amici curiae* believe that further briefing is necessary to explore matters not fully addressed by the parties' briefs, particularly the potential breadth of the impact of First Student's interpretation of the void for vagueness doctrine on laws beyond the area of consumer reporting. The parties' briefing explores the text, history and application of California's consumer reporting statutes; it does not focus on the broader potential impact of the *Ortiz* approach on other areas of law. But there is nothing inherent in the *Ortiz* court's reading of the 14th Amendment's due process clause that would limit its effect to consumer reporting. To the contrary, if a person has a constitutional right to be subject to no more than one law at a time on a given subject, or

if compliance with one of two overlapping laws renders the other law void, then virtually every field of law would be disrupted: criminal law, intellectual property, antitrust, consumer law, environmental law, civil rights, commercial law, to name but a few. The list of affected areas is very long indeed.

In determining whether to adopt the reasoning of *Ortiz*, this Court would benefit from a full explication of the potential consequences of its decision. The proposed *amici* believe that providing this context may add substantially to the Court's analysis.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: May 26, 2015 Respectfully submitted,

By: /s/ Seth E. Mermin .

SETH E. MERMIN, SBN 189194
THOMAS BENNIGSON, SBN 237804
RACHEL A. FOODMAN
PUBLIC GOOD LAW CENTER
3130 Shattuck Ave.
Berkeley, CA 94705
Telephone: (510) 393-8254
TMermin@publicgoodlaw.org

Counsel for amici curiae

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 4

EILEEN CONNOR AND JOSE GONZALEZ, Plaintiffs-Appellants, v. FIRST STUDENT, INC.; FIRST TRANSIT, INC.; HIRERIGHT SOLUTIONS, INC.; HIRERIGHT, INC., Defendants-Respondents	Appeal Nos. B256075, B256077 Los Angeles Superior Court No. JCCP 4624 (In re First Student, Inc. Cases) Trial Judge: The Hon. John S. Wiley

BRIEF OF *AMICI CURIAE* CALIFORNIA REINVESTMENT COALITION, CONSUMER ACTION, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, HOUSING AND ECONOMIC RIGHTS ADVOCATES, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL HOUSING LAW PROJECT AND PUBLIC GOOD LAW CENTER *IN SUPPORT OF PLAINTIFFS-APPELLANTS*

[Service on Attorney General required pursuant to California Rule of Court 8.29(c)]

SETH E. MERMIN, SBN 189194
THOMAS BENNIGSON, SBN 237804
RACHEL A. FOODMAN
PUBLIC GOOD LAW CENTER
3130 Shattuck Ave.
Berkeley, CA 94705
Telephone: (510) 393-8254
TMermin@publicgoodlaw.org

Counsel for amici curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Federal Cases

California Statutes

Federal Statutes

Other Authorities

INTRODUCTION

Operating side by side, California's two principal laws governing consumer reports provide critical dual protection to consumers of this state. Together, the Investigative Consumer Reporting Agencies Act (ICRAA) and the Consumer Credit Reporting Agencies Act (CCRAA) form a unified shield against abuses by the consumer reporting industry.

The legislature's decision to enact a multi-layer statutory scheme deserves deference from this Court. Invalidation of overlapping laws is proper only where the laws irreconcilably conflict – a high bar that First Student has not and cannot meet here. Particularly because the ICRAA and the CCRAA share the same legislative purpose of ensuring fairness in the use of consumer reports, this Court can easily reconcile and give full effect to both statutes. Longstanding United States and California Supreme Court precedent demands nothing less. In a wide variety of contexts stretching from employment law to consumer law to environmental law to antitrust law to banking law – indeed, to just about any area of regulated conduct – courts have readily handled overlapping laws without declaring one or more of those statutes unconstitutionally vague. Faced with complex and intersecting legal schemes, judicial decisions have regularly and repeatedly rejected constitutional challenges and instead worked to harmonize overlapping laws. In doing so, courts have carefully avoided, whenever possible, a statutory interpretation that deprives any statute of full force. A decision upholding the ICRAA and the CCRAA follows inescapably from this long line of

decisions.

Ignoring this overwhelming precedent, First Student urges this Court to affirm the superior court's decision striking down the ICRAA as unconstitutionally vague for overlapping with the CCRAA. This tacit transformation of the void for vagueness doctrine into a "void for overlapping" approach stems from a single judicial decision of a single court, *Ortiz v. Lyon Mgmt. Grp., Inc.* (2007) 157 Cal.App.4th 604, and stretches the traditional bounds of the vagueness doctrine beyond recognition. Where, as here, two statutes are well defined and give clear notice of the conduct they require, their overlap alone cannot justify a finding of unconstitutionality. And, tellingly, broad application of a "void for overlapping" approach would call into question the validity of statutory schemes in nearly every field of law.

Adoption of First Student's proposed approach would eviscerate California's consumer reporting regime and could lead to widespread, unnecessary disruption of long-settled law. *Amici* ask that this Court confirm well-established principles of statutory interpretation laid down by the California and U.S. Supreme Courts, reverse the decision below, and uphold the ICRAA.

INTEREST OF *AMICI CURIAE*

The proposed *amici curiae* constitute a diverse group of public interest organizations dedicated to protecting and vindicating the rights of Californians in fields of law ranging from automobile sales to housing, from employment to consumer finance. They submit this brief for two reasons: (1) to help preserve California's longstanding and vital statutory regime regulating consumer reporting, and (2) to convey the urgency of understanding the potential consequences of – and rejecting – an interpretation of the Due Process Clause that could decimate established regulatory structures in virtually every substantive area of California law.

California Reinvestment Coalition (CRC) has been advocating for fair and equal access to credit for all California communities since 1986. Over nearly 30 years, CRC has grown into the largest state community reinvestment coalition in the country with a membership of 300 nonprofit organizations working for the economic vitality of low-income communities and communities of color. Among our members are a diverse set of organizations including nonprofit housing counselors, consumer advocates, community organizers, legal service providers, affordable housing developers, small business technical assistance providers, and more. The people our members serve need the protections of California's consumer reporting laws. They also need crucial laws addressing discrimination in housing, lending and other vital activities that would be endangered by a legal doctrine that strikes laws down simply because they overlap in what they cover.

Consumer Action is a non-profit, membership-based organization committed to consumer education and advocacy in California. During its more than three decades, Consumer Action has become renowned for its multilingual consumer education and advocacy in the fields of consumer protection, credit, banking, privacy, insurance and utilities. In all of these fields, overlapping laws provide crucial protections to California residents.

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has spearheaded enactment of numerous landmark laws to improve protections for the car-buying public, which have been signed into law by governors from both major parties, and has successfully petitioned the National Highway Traffic Safety Administration for promulgation of federal motor vehicle safety regulations. CARS has been a leading proponent of full disclosure of important and relevant information to consumers, including sponsoring first-in-the-nation legislation enacted in California to prohibit the imposition of secrecy in settlements with manufacturers who repurchase seriously defective "lemon" vehicles. If laws which happen to overlap in their coverage are held to be unconstitutionally vague, protections for California car buyers will be severely damaged.

Housing and Economic Rights Advocates (HERA) is the only California statewide, not-for-profit legal service and advocacy organization with the mission of ensuring that all people are protected from discrimination and economic abuses,

especially in the realm of housing. Our work includes providing direct legal services on all forms of credit reporting problems. We promote affordable and fair credit access, asset building and preservation. We fight abusive mortgage servicing, problems with homeowner associations, foreclosure, escrow and other homeowner problems. We fight predatory lending of all kinds. All of our work requires a robust system of interlocking laws that together serve to protect all Californians.

National Association of Consumer Advocates (NACA) is a nationwide non-profit corporation whose over 1,000 members are private, public sector, legal services and non-profit lawyers, law professors, and law students whose primary practices or interests involve consumer rights and protection. NACA is dedicated to furthering the effective and ethical representation of consumers and to serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. NACA has furthered this interest in part by appearing as amicus curiae in support of consumer interests in federal and state courts throughout the United States. NACA has appeared as amicus curiae in support of consumer interests in many California courts, including among others *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011); *Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 (2006); and *Hood v. Santa Barbara Bank & Trust*, 143 Cal. App. 4th 526 (2006).

National Employment Law Project (NELP) is a non-profit law and policy organization with 40 years of experience advocating for the employment and labor rights of the nation's workers. Relevant to this matter, NELP has an interest in upholding the

validity of California's consumer reporting regime and other vital employment-related laws that overlap in the support and protections they provide.

National Housing Law Project (NHLP) is a charitable nonprofit corporation established in 1968 whose mission is to use the law to advance housing justice for the poor by increasing and preserving the supply of decent, affordable housing; by improving existing housing conditions, including physical conditions and management practices; by expanding and enforcing tenants' and homeowners' rights; and by increasing housing opportunities for people protected by fair housing laws. NHLP recognizes the importance of preserving laws – including overlapping laws – that provide crucial protections to people seeking to find and maintain housing.

Public Good Law Center is a public interest organization dedicated to the proposition that all are equal before the law. Through cases of particular significance for consumer protection, free speech and civil rights, Public Good seeks to ensure that the protections of the law remain available to everyone. The ICRAA and CCRAA represent a careful legislative balance between the need for information by users of consumer reports and the need for privacy and accuracy. To upset that balance simply because laws may have areas of overlap would represent a deep, arbitrary, and troubling intrusion into the realm of the legislature.

ARGUMENT

Since their joint enactment in 1975, the ICRAA (Cal. Civ. Code, §§ 1786-1786.2) and the CCRAA (Cal. Civ. Code, §§ 1785.1-1785.6) have operated in harmony to thwart harmful practices in the consumer reporting industry. There is no reason they cannot continue to do so today. When originally enacted, the ICRAA was limited to information "obtained through personal interviews." Although the two laws contained strong protections, by 1998 the legislature had become troubled by the employment and tenant screening industries' growing and "broad use of database information, such as DMV records, civil judgments, bankruptcies, criminal records, etc.," which did not exist when the ICRAA and the CCRAA were enacted in the 1970s. (Appellants' Request for Judicial Notice, Exh. B at pp. 3-4.) To reflect these changes in the industry, the legislature in 1998 removed the personal interviews limitation and expanded the reach of the ICRAA, which contained stricter requirements and higher penalties than the CCRAA. (Cal. Civ. Code, § 1786.2(c).) The legislature hoped this expansion would give "fewer employment background search organizations" the "opportunity to make bogus or inaccurate data available on an individual." (Appellants' Opening Brief (AOB), Exh. F.)

As a result of the 1998 amendments, the overlap between the ICRAA and the CCRAA increased substantially, though certain reports are still only subject to one or the other. That consumers may have dual protection provides no cause for confusion to businesses, however, since compliance with the ICRAA's more stringent requirements will also satisfy the CCRAA. And because the ICRAA and the CCRAA do not conflict

at all – much less irreconcilably – they must be harmonized. (*Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal. 4th 783, 805.)

Respondents First Student, Inc. and First Transit, Inc. (collectively "Respondents" or "First Student") nevertheless assert that the overlap between the ICRAA and the CCRAA creates confusion that renders the ICRAA constitutionally invalid. (*See* Respondents' Brief [Resps.' Br.] at 3.) That assertion – indeed, the void for vagueness doctrine as a whole – has no place here, since both the ICRAA and the CCRAA clearly define the conduct they require. Moreover, First Student's expansive and novel version of the void for vagueness doctrine contrasts starkly with a myriad of federal and California cases analyzing overlapping laws. There is good reason for that contrast. A doctrine that invalidates laws simply because they overlap makes no sense when complex, multi-layer statutory schemes pervade nearly every field of law. The approach advanced by First Student is unworkable, at odds with longstanding precedent, and should not dictate the result in this case.

I. UNDER THE DOCTRINE OF IMPLIED REPEAL, THE PROPER FRAMEWORK FOR ANALYZING OVERLAPPING STATUTES, THE ICRAA AND THE CCRAA ARE READILY UPHELD.

The doctrine of implied repeal, not void for vagueness, is the correct lens for analyzing the overlap between the ICRAA and the CCRAA. This implied repeal doctrine requires a court to harmonize "two acts upon the same subject," not to discard one or the other of them. (*United States v. Borden Co.* (1939) 308 U.S. 188, 198.) A finding of implied repeal is one of last resort, because courts must "give effect to both [laws] if possible." (*Id*.) Here, the Court can easily harmonize the ICRAA and the CCRAA, and

"construe them to give force and effect to all of their provisions." (*Pac. Palisades*, *supra*, 55 Cal. 4th at p. 805.) Specifically, the Court, in deference to the legislature, should apply the ICRAA's "higher requirement[s] as satisfying both" the ICRAA and the CCRAA. (*Powell v. U.S. Cartridge Co.* (1950) 339 U.S. 497, 518-19.)

Neither the ICRAA nor the CCRAA contains an "express declaration of legislative intent" to repeal the other. (*Pac. Palisades*, *supra*, 55 Cal. 4th at p. 805.) Where no such declaration exists, a finding of implied repeal is proper "only when there is no rational basis for harmonizing two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Id.*) The ICRAA and the CCRAA, though overlapping, are certainly not irreconcilable.

Courts have repeatedly upheld overlapping statutes, especially where, as here, the same legislative purpose underlies both laws. In the context of a newly enacted Labor Code provision governing workers' compensation, for example, the California Supreme Court rejected the employer's argument that the new provision limited an employee's relief under pre-existing Labor Code protections: The "legislative purpose underlying the [new] legislation was to provide additional protection for vulnerable employees; the enactment was not intended to relieve uninsured employers of obligations existing under prior law." (*Flores v. Workmen's Comp. Ap. Bd.* (1974) 11 Cal. 3d 171, 176.) Similarly, the California legislature intended the 1998 amendments to the ICRAA to broaden protections for consumers. (Exh. F to AOB.) In light of this purpose, reading the

amendments to strip away the very protections that the ICRAA provides is an extreme step. Indeed, such a holding would directly contradict the intent of the legislature.

Given that the same legislative purpose – protecting consumers – underlies the ICRAA and the CCRAA, it comes as no surprise that the two statutes may easily be harmonized. Indeed, the introductory language in the statutes is nearly identical, each describing the "need to insure that [] consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." (*Compare* Cal. Civ. Code, § 1785.1 *with id*. at § 1786.) In light of this shared purpose, a long line of cases requires this Court to construe the ICRAA and the CCRAA as "mutually supplementary" rather than "mutually exclusive," unless it is impossible to do so. (*E.g., Powell v. U.S. Cartridge Co.* (1950) 339 U.S. 497, 518-19 (applying the "higher requirement [of two labor laws] as satisfying both"); *Pac. Palisades*, *supra*, 55 Cal. 4th 783 (requiring compliance with three overlapping coastal development laws).) These precedents belie First Student's false assertions that Plaintiffs-Appellants have "provided no interpretation that would solve the vagueness problem" and "cited no authority supporting [the] argument that an employer needs to comply with ICRAA's more stringent requirements." (Resps.' Br. at 26, 53.)

The California Supreme Court's recent decision in *Pacific Palisades* embodies this rule of harmonization. (*Pac. Palisades*, *supra*, 55 Cal. 4th at p. 793 (examining the "interplay among three separate statutory schemes," all "regulating development within California's coastal areas").) The defendant, a mobile home developer, asserted that a new local law prohibited municipal government from enforcing compliance with two

state laws. (*Id.* at p. 801.) The Court rejected that argument, emphasizing that the local law could rationally be construed to require certain actions of the developer "*in addition* to the procedures and hearings required by other state laws." (*Id.* at p. 805 (emphasis in original).) The ICRAA likewise sets out protections for consumers "*in addition* to," not instead of, those contained in the CCRAA. (*Id.*) And, as in *Pacific Palisades*, "significant state policies favor an interpretation" of the ICRAA that "does not deprive" either the ICRAA or the CCRAA of force. (*Id.* at p. 803.) Protecting against the misuse of consumer reports is a complex task – one in which both the ICRAA and the CCRAA play a critical role.

The idea that overlapping laws "do not pose an either-or proposition" follows logically from the reality that "[r]edundancies across statutes are not unusual events in drafting." (*Connecticut Nat'l Bank v. Germain* (1992) 503 U.S. 249, 253.) That the ICRAA and the CCRAA both apply to certain consumer reports is of no consequence "so long as there is no 'positive repugnancy' between two laws." (*Id*.) And, far from conflicting with one another, the ICRAA and the CCRAA provide much needed "dual protection" (*J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.* (2001) 534 U.S. 124, 144) to consumers facing a growing and evolving consumer reporting industry. The U.S. Supreme Court has repeatedly endorsed overlapping laws that create multiple layers of protection, assuming "each reaches some distinct cases," as do the ICRAA and the CCRAA. (*See id.*) Moreover, the dual protection concept extends far beyond the consumer context. (*See, e.g., Mazer v. Stein* (1954) 347 U.S. 201, 217 (holding that patentability of an object does not preclude copyright of that object as a work of art);

Herman & MacLean v. Huddleston (1983) 459 U.S. 375, 381 (harmonizing the Securities Act of 1933 and the Securities Exchange Act of 1934); *Brown v. Superior Court* (1984) 37 Cal. 3d 477, 486-87 (upholding overlapping employment laws); *Natural Res. Def. Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal. App. 3d 959, 965 (harmonizing overlapping environmental laws).)

Practically, dual protection schemes often mean that a specific action is covered by two laws but triggers stricter penalties under one. This does not mean, of course, that a court must "choose between giving effect" to one law and ignoring the other. (*Germain*, *supra*, 503 U.S. at p. 253.) Rather, the regulated party can simply "apply[] the higher requirement as satisfying both" laws. (*Powell*, *supra*, 339 U.S. at p. 528.) Here, if the creation of a consumer report triggers both the ICRAA and the CCRAA, then compliance with the ICRAA will also satisfy the CCRAA. There is no reason that the two statutes cannot "comfortably coexist." (*Things Remembered, Inc. v. Petrarca* (1995) 516 U.S. 124, 129.)

When the California legislature wants to create mutually exclusive statutes, it knows how to do so. For example, in contrast with the situation here, the Commercial Credit Reporting Agencies Act, which covers reports "relating to the financial status or payment habits of a commercial enterprise," states explicitly that its terms do *not* apply to any report covered by the ICRAA or the CCRAA. (Cal. Civ. Code, §§ 1785.42 [a commercial credit report "does not include a report subject to Title 1.6 (commencing with Section 1785.1), Title 1.6A (commencing with Section 1786) . . . "].) In the absence of such express language, the presumption for interpreting different statutes is that they be

seen "not as antagonistic laws but as parts of the whole system which must be harmonized and effect given to every section." (*Natural Resources Defense Council, Inc*., *supra*, 59 Cal. App. 3d at p. 965.)

The ICRAA and the CCRAA cannot be deemed unconstitutional or invalid simply because they overlap. To the contrary, under the doctrine of implied repeal, the strong presumption against invalidating overlapping statutes can only be overcome where the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Pac. Palisades*, *supra*, 55 Cal. 4th at p. 805.) That is not the case here. The consumer protections in the ICRAA and the CCRAA stem from the same legislative purpose, and provide dual protection that is supplementary, not contradictory. When a business takes an action that is covered by both laws, it must comply with both laws, as businesses have done without issue for the last two decades.

II. *ORTIZ* IMPROPERLY INTERPRETED THE VOID FOR VAGUENESS DOCTRINE, CREATING A CONSTITUTIONAL PROBLEM FOR THE ICRAA WHERE NONE ACTUALLY EXISTS.

Ignoring the implied repeal doctrine, First Student urges this Court to adopt the reasoning of *Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604 and find the ICRAA void for vagueness. But the *Ortiz* court's expansive reading of "void for vagueness" cannot be reconciled with the doctrine established by the U.S. and California Supreme Courts.[1] In general, "[s]tatutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears." (*Lockheed Aircraft Corp. v. Sup. Ct. of*

[1] Both federal and state law are relevant here. (*See* AOB at 12-13 (citing *People v. Morgan* (2007) 42 Cal.4th 593, 605 [scope of the void for vagueness doctrine under state law is the same as under federal law]).)

Los Angeles Cty. (1946) 28 Cal. 2d 481, 484.) *Ortiz* acknowledged this "presumption" in favor of the ICRAA's validity, but then proceeded to disregard it entirely. (*Ortiz, supra,* 157 Cal. App. 4th at p. 613.) Instead of following the maxim that "mere doubt does not afford sufficient reason for a judicial declaration of invalidity" (*Lockheed Aircraft Corp, supra*, 28 Cal. 2d at p. 484), the court improperly manufactured confusion where none existed and deemed the routine overlap of two statutes a constitutionally fatal flaw.

The touchstone of the void for vagueness doctrine is reasonable notice. So long as a statute gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," the statute must be upheld. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108; *People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1117.) In other words, a law denies due process only "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 56 (quoting *Giaccio v. Pennsylvania* (1966) 382 U.S. 399, 402–403).)

The ICRAA and the CCRAA both provide reasonable notice to users and makers of consumer reports regarding the conduct they require. That a consumer report may contain information that triggers the application of both laws in no way renders the ICRAA and the CCRAA "vague and standardless." (*City of Chicago, supra*, 527 U.S. at p. 56.) As Plaintiffs-Appellants have amply demonstrated, the language of each individual statute is clear and well defined. (*See, e.g.,* AOB at p. 25.) Where a report meets the definition of an "investigative consumer report" under the ICRAA and a

"consumer credit report" under the CCRAA, a business must simply ensure compliance with both statutes.

The fact that the ICRAA and the CCRAA govern the conduct of businesses further diminishes any void for vagueness challenge. The high court has long held that "economic regulation is subject to a less strict vagueness test" than that required for criminal laws or laws that implicate First Amendment rights. (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 498.) This relaxed level of scrutiny is justified because businesses that request and prepare consumer reports "can be expected to consult relevant legislation in advance of action" and could have requested clarification or revision of the ICRAA and the CCRAA if they found the laws unclear. (*Id.*)

Moreover, the "common knowledge and understanding of members of the particular vocation or profession to which the statute applies" can provide the "required certainty" to a law that otherwise "fails to provide an objective standard by which conduct can be judged." (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 765.) Businesses like First Student have been operating under restrictions imposed by the post-1998 ICRAA and CCRAA for over fifteen years. Published practice guides explaining federal and state consumer reporting statutes simply state that employers must comply with both the ICRAA and the CCRAA where appropriate and note that California requirements will differ if the employer seeks "only credit information." (*See, e.g.,* Charles H. Kennedy (2008) BUSINESS PRIVACY LAW HANDBOOK, at p. 110 ["disclosure and other requirements in the FCRAA, 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 which law(s) must be complied with in various circumstances); Lawrence J. Gartner, Ethan Chernin & Stefanie M. Gushá (2005) 1 ADVISING CALIFORNIA EMPLOYERS AND EMPLOYEES §§ 35-45 [detailing notice and adverse action requirements for the ICRAA and the CCRAA]; Ronald J. Souza (2014) 8 PRIVACY COMPLIANCE AND LITIGATION IN CALIFORNIA §§ 27-34 [summarizing requirements under both the ICRAA and the CCRAA]; K&L Gates LLP (Apr. 9, 2008) *Background Checks in Employment* (Presentation)[2] [emphasizing that companies should employ "a separate disclosure/consent form that contains all required disclosures under ICRAA, CCRA, and FCRA" because "California employers must comply with ALL three"] [emphasis in original].) Clearly, First Student was not "left to guess and speculate as to whether the ICRAA forbad its obtaining the reports in the manner it did." (Resps.' Br. at p. 42.)

Given the existence of these materials and the passage of so many years since the ICRAA amendments, First Student's attempt to argue that it suddenly does not understand how to act when a report is subject to both statutes strains credulity. A distorted interpretation of the void for vagueness doctrine must not be allowed to excuse compliance with the full requirements of California law.

[2] *Available at* http://www.klgates.com/files/upload/Presentation_Background_Checks.pdf

III. IF WIDELY ADOPTED, *ORTIZ*'S IMPROBABLE READING OF THE VOID FOR VAGUENESS DOCTRINE WOULD WREAK HAVOC ON CALIFORNIA LAW.

Adopting the reasoning of *Ortiz* would improperly transform the void for vagueness doctrine into a "void for overlap" rule that requires the invalidation of clear and comprehensible laws for the sole reason that they happen to cover the same ground as another law. Widespread adoption of this newly invented rule would call into the question the constitutional validity of overlapping statutory schemes in nearly every area of law – schemes that courts have repeatedly upheld. It is, in sum, impossible to reconcile the reasoning of *Ortiz* with the ubiquity of overlapping state and federal laws.

A. Application of the *Ortiz* Rule Would Require Courts, Contrary to Longstanding Precedent, to Strike Down Overlapping Criminal Laws.

Application of the *Ortiz* "void for overlap" approach in the criminal context would compel the invalidation of a wide swath of parallel criminal laws. Unsurprisingly, the United States Supreme Court has soundly rejected this result. (*See United States v. Batchelder* (1979) 442 U.S. 114, 115-16.) Faced with "two overlapping provisions" that both "prohibit[ed] convicted felons from receiving firearms, but authorize[ed] different maximum penalties," the Court held that "[s]o long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." (*Id.* at pp. 115-16, 123.)[3] The

[3] First Student claims that it need not comply with the ICRAA and the CCRAA because "[n]either statute contains any language indicating a party requesting a background report as authorized by the CCRAA also needs to comply with ICRAA before doing so." (Resps.' Br. at p. 52.) This argument is a straw man. A statute need not reference similar, overlapping statutes to avoid impliedly repealing those sister statutes. For

logic of *Ortiz* cannot be reconciled with the broad principle of harmonization established by the U.S. Supreme Court.

The emphasis on harmonization in *Batchelder* is particularly striking given the Supreme Court's instruction that the void for vagueness doctrine be most strictly enforced in the criminal context. (*Vill. of Hoffman Estates*, *supra*, 455 U.S. at p. 498.) This "greater tolerance of enactments with civil rather than criminal penalties" makes sense "because the consequences of imprecision are qualitatively less severe" in the civil context. (*Id.* at pp. 498-99.) Yet, as demonstrated below, courts strive to reconcile even criminal laws. *Ortiz*'s rigid analysis and lack of effort to harmonize the ICRAA and the CCRAA are particularly salient, then, given that the statutes are *civil* laws meriting substantial deference.

Notably, the overlapping criminal firearm laws upheld in *Batchelder* share key similarities with the ICRAA and the CCRAA. First, both pairs of laws overlap as to the conduct they prohibit. The criminal laws in *Batchelder* both prohibited receipt of a firearm that had traveled in interstate commerce under certain circumstances. (*Id.* at pp. 118-19.) The ICRAA and the CCRAA prohibit the creation and use of consumer reports containing creditworthiness and character information unless specific requirements are met. (*Compare* Cal. Civ. Code, §§ 1786.10-40 *with* Cal. Civ. Code, §§ 1785.10-19.5.) Second, both pairs of laws contain one law with higher penalties than the other. In *Batchelder*, one law provided a five-year maximum sentence, while the second capped

---

example, the criminal law in *Batchelder* that carries the lesser sentence does not reference the law with the higher sentence, but the Court made clear that compliance with both laws is required.

imprisonment at two years. (*Batchelder*, 442 U.S. at pp. 118-19.) Similarly, the ICRAA imposes higher penalties and demands more in terms of disclosure than the CCRAA. (*Compare* Cal. Civ. Code, §§ 1786.50-60 *with* Cal. Civ. Code, §§ 1785.30-36.) Third, despite their overlap, both laws clearly state the conduct they proscribe or require. The *Batchelder* firearm statutes "unambiguously specify" which individuals may be involved with the sale of firearms and under what conditions. (*Batchelder*, 442 U.S. at p. 123 (discussing 18 U.S.C. § 922(h) and 18 U.S.C. App. § 1202(a)).) The ICRAA and the CCRAA each set forth specific steps that must be taken when ordering certain consumer reports. (*Compare* Cal. Civ. Code, §§ 1786.10-1786.40 *with* Cal. Civ. Code, §§ 1785.10-1785.19.5.)

As this juxtaposition makes clear, if the criminal statutes in *Batchelder* were not void for vagueness, then *a fortiori* the civil statutes at issue here pass constitutional muster. Yet the *Ortiz* court failed to follow the high court's analysis in *Batchelder* and reached the opposite conclusion. In *Batchelder,* the Court dismissed as a concern that "particular conduct may violate both [laws]," because the laws' overlap did "not detract from the notice afforded by each." (*Id.*) The court of appeal in *Ortiz* noted that, as a result of the 1998 amendment, the disputed consumer reports were subject to both the ICRAA and the CCRAA but, despite the greater deference due civil laws, deemed the statutory scheme unconstitutional for failing "to set forth truly distinct categories." (*Ortiz*, *supra*, 157 Cal. App. 4th at pp. 612-13.) This "distinct categories" requirement would invalidate – among many other laws – precisely the criminal laws that the Supreme Court upheld in *Batchelder*. (*Batchelder, supra,* 442 U.S. at p. 115.)

In the thirty-five years since *Batchelder*, courts have repeatedly relied on that seminal decision to uphold overlapping criminal statutes – which, again, are granted substantially less deference than their civil counterparts. So long as neither law could "serve as an effective substitute" for the other, the "mere potential for some transactions to run afoul of both prohibitions gives no cause to read" one law as limiting the other. (*Abramski v. United States* (2014) 134 S. Ct. 2259, 2263.) A long line of cases bolsters this conclusion. (*See, e.g., Mitchell v. Super. Ct.* (1989) 49 Cal. 3d 1230, 1250 [upholding two different sentencing requirements in overlapping contempt laws]); *People v. Super. Ct.* (*Caswell*) (1988) 46 Cal.3d 381, 393 [reconciling a state law prohibiting lewd acts with one prohibiting indecent exposure]); *Davis v. Mun. Ct.* (1988) 46 Cal. 3d 64, 88-89 [upholding overlapping state and municipal misdemeanor diversion statutes].) Against this backdrop, the *Ortiz* court's treatment of overlapping laws – indeed, overlapping *civil* laws – stands conspicuously alone.

B. The ICRAA and the CCRAA, Like Many Statutes That Create Public Rights, Provide Multiple Layers of Protection.

Judicial harmonization of overlapping statues is by no means limited to the criminal context; to the contrary, courts have repeatedly upheld overlapping laws, like the ICRAA and CCRAA, that protect consumers or create public rights. Environmental and employment laws provide just two such examples. Applying the principle that "economic regulation is subject to a less strict vagueness test," courts have frequently harmonized overlapping laws in both fields. (*Vill. of Hoffman Estates*, *supra*, 455 U.S. at

p. 498.) There is no reason to deviate from this approach when analyzing California's consumer reporting statutes.

1. In contrast to *Ortiz,* courts have frequently upheld environmental statutes that require compliance with complex, overlapping provisions.

Federal and state courts alike have repeatedly turned back challenges to overlapping environmental laws, where multiple layers of regulation protect the public from harmful pollutants. Federal environmental regulatory regimes like the Clean Water Act (33 U.S.C. §§ 1251-1376), the Clean Air Act (42 U.S.C. §§ 7401-7626), and the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901-6992k) are perhaps the quintessential examples of overlapping laws.[4] The Supreme Court has explicitly refused to interpret them in a way that reads a given layer of protection out of existence. (*Envt'l Def. Fund v. Duke Energy Corp.* (2007) 549 U.S. 561.) In *Duke Energy*, the debate centered around two air pollution control schemes in the Clean Air Act, both of which regulate modifications to "stationary sources" of pollution. (*Id.* at p. 565.) Like the ICRAA amendments, Congress enacted the more protective provision after determining that the original regulation had done "too little to 'achiev[e] the ambitious goals of the 1970 Amendments.'" (*Id.* at p. 567.) The two provisions rely on different definitions of the term "modification" to determine coverage, yet Duke Energy argued that the

[4] Each of these statutes by itself sets forth a multi-layer system that businesses must learn and follow. For example, RCRA imposes a base set of requirements on the management of "solid waste," with additional requirements for "hazardous waste," a more dangerous subset of solid waste. (*Compare* 42 U.S.C. § 6903(5) *with* 42 U.S.C. § 6903(27).) The fact that a waste management company must comply with both sets of requirements where hazardous waste is involved is a normal consequence of this tiered strategy.

narrower definition from the original regulation determined coverage of both provisions. (*Id.* at pp. 569-71.) The Supreme Court rejected this attempt to collapse the two statutes into one to avoid compliance with the more rigorous, new provision. (*Id.* at p. 581 [noting that this construction would be an "implicit invalidation" of the stricter provision].)

The California Supreme Court likewise follows the rule of statutory construction favoring harmonization. Recently, the Court analyzed the interplay between not two but three different California environmental laws: the California Coastal Act (Cal. Pub. Res. Code, §§ 30000-30900), the Mello Act (Cal. Govt. Code, §§ 65590 & 65590.1), and the Subdivision Map Act (Cal. Govt. Code, §§ 66410-66499.37), "each furthering important state interests and each in some manner regulating development within California's coastal areas." (*Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, supra,* 55 Cal.4th at p. 793.) The plaintiff, a mobile home park developer, argued for a restrictive interpretation of the most recent Subdivision Act as prohibiting "local governmental entities from enforcing compliance with any state law requirements except for those imposed by the section itself." (*Id.* at p. 801.) The Court refused to allow this effective repeal of the Coastal and Mello Acts, finding that the "significant state policies" behind all three laws compelled an interpretation that gave "force and effect to all of their provisions." (*Id.* at p. 803.)

Unlike *Ortiz*, these decisions have harmonized overlapping laws, interpreting them "broadly in order to afford the fullest protection to the environment within the reasonable scope of the statutory language." (*Natural Res. Def. Council, Inc., supra,* 59 Cal. App.

3d at p. 965.) Often, this approach has led courts to impose greater requirements on entities covered by these laws, rather than limiting their obligations. (*Id.* [requiring that timber companies comply with the Forest Practice Act (FPA) and the California Environmental Quality Act (CEQA), even though the FPA does not mandate some of the stringent procedural requirements set forth in CEQA].) These decisions characterize overlapping statutes "not as antagonistic laws but as parts of the whole system which must be harmonized." (*Id.*)

Against the backdrop of these cases, the *Ortiz* decision appears oddly anomalous. Rather than recognize the implications of the ICRAA and the CCRAA's common underlying consumer protection purpose, *Ortiz* ignored it. (*Ortiz*, *supra*, 157 Cal. App. 4th at pp. 614-16.) Rather than seeking to harmonize the statutes, *Ortiz* manufactured confusion between them. (*Id.* at pp. 618-19.) Rather than acknowledging that the ICRAA and the CCRAA separately provide clear notice of the conduct they require, *Ortiz* focused on the fact of overlap itself as problematic. (*Id.*) And rather than giving force to all statutory provisions and requiring that companies continue to observe a law that they understood and had complied with for years, *Ortiz* purported to remove an essential part of California's consumer reporting regime. (*Id.*)

2. Labor and employment laws routinely overlap, providing workers with dual protection that courts routinely and uncontroversially approve.

Overlapping employment laws provide another example of statutory schemes granting public rights whose constitutional validity the *Ortiz* approach would call into question. As employment lawyers on both sides well know, it is the norm, not the

exception, for a plaintiff bringing an employment lawsuit to seek judgment based on multiple, overlapping state and federal laws. (*See Brown v. Superior Court*, *supra*, 37 Cal. 3d at p. 486-87.)

Neither the U.S. nor the California Constitution erects a barrier to such a cover-your-bases strategy. Indeed, courts routinely construe employment laws as providing supplemental and complementary protection to workers. Pregnancy discrimination law provides a vivid example. Although California's general employment discrimination law, the Fair Employment and Housing Act (FEHA) (Cal. Govt. Code, §§ 12900-12996), has long covered discrimination due either to sex or to medical disabilities related to pregnancy, the legislature recently enacted the Pregnancy Disability Leave Law (PDLL), which offers broader remedies to women facing pregnancy discrimination. (Cal. Gov't Code, §§ 12940, 12945.) Rejecting arguments that the PDLL's enactment diminishes FEHA, the court of appeal recently found that the PDLL's remedies "*augment*, rather than supplant, those set forth elsewhere in FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal. App. 4th 1331, 1338 [emphasis in original].) Both laws provide a basis for liability and a source of potential remedies.

The principle enunciated in *Sanchez* applies broadly in the employment field because "employment discrimination cases, by their very nature, involve several causes of action arising from the same set of facts." (*Brown, supra*, 37 Cal. 3d at pp. 486-87.) Given that a "responsible" employment law attorney knows she "must plead a variety of statutory, tort and contract causes of action in order to fully protect the interests" of her client, reading employment statutes narrowly to be mutually exclusive of each other

would "lead to absurd results." (*Id.*) Put another way, relying on an "overly technical" reading of one employment law to prevent a plaintiff from also seeking a favorable judgment under another employment law would "frustrate the intent" of the first law. (*Id.*) Yet the rule in *Ortiz*, which would invalidate the protection of the ICRAA simply because a plaintiff can also plead a CCRAA claim, would lead directly to the sort of "absurd results" warned against by the California Supreme Court.

Broadly interpreting overlapping employment statutes where new laws expand coverage of older laws is not a new approach. In 1976, the California Uninsured Employers Fund's attempted to defend against an unemployment insurance claim by arguing that recent legislation had imposed a "new, more restrictive limit" on worker claims. (*Flores v. Workmen's Comp. Appeals Bd.*, *supra*, 11 Cal. 3d at p. 176.) Our Supreme Court rejected that claim. The Court examined the recent legislation and the laws that preexisted it, and determined that the purpose underlying the new law "was to provide additional protection for vulnerable employees; [not] to relieve uninsured employers of obligations existing under prior law." (*Id.*)

Indeed, when faced with two laws covering the same conduct, the U.S. Supreme Court has suggested that employers should comply with the requirements of whichever law is more stringent. (*Powell v. U.S. Cartridge Co.*, *supra*, 339 U.S. at p. 518.) For example, the Fair Labor Standards Act and the Walsh-Healey Act overlap in terms of the employers they cover, but have different minimum wage requirements. In *Powell*, the defendant-employer argued that this overlap made the laws "mutually exclusive," and claimed it was subject only to the Walsh-Healy Act. (*Id.* at pp. 519-20.) The Court

disagreed, describing the laws as "mutually supplementary," not "mutually exclusive," because defendants had failed to demonstrate that "compliance with one Act [made] it impossible to comply with the other." (*Id.*) Moreover, employers could protect themselves by "applying the higher requirement" of the two laws to satisfy both. (*Id.*)

Ortiz cannot be squared with this uniform body of case law. Under the rule that First Student urges here, the fact that California's new pregnancy discrimination law overlaps with and strengthens the remedial provisions of FEHA would provide a reason to *invalidate* the new law, rather than to allow for a judgment based on the existence of two supplemental statutes. (*See Sanchez,* 213 Cal. App. 4th at p. 1337.) The *Ortiz* rule would similarly discount the common purpose underlying the two minimum wage laws in *Powell*, and instead would allow employers to assert that the overlap creates constitutionally problematic confusion.

These hypothetical applications demonstrate the weakness of *Ortiz's* reasoning. This Court should look instead to the approach taken by almost all other courts, federal and state, which deliver clear examples of a common-sense approach to the construction of overlapping laws. Unlike *Ortiz*, these employment cases seek a way to give meaning to all provisions of overlapping laws, particularly where the legislature has clearly attempted to increase protections for vulnerable individuals. By relying on this longstanding and directly analogous precedent, this Court can likewise give effect to both the ICRAA and the CCRAA.

C. Courts Routinely Uphold Overlapping Commercial Laws, Demonstrating That the Judicial Emphasis on Harmonizing Statutes Reaches Far Beyond Laws Creating Public Rights.

The judicial preference for harmonization rather than invalidation of overlapping statutes is by no means limited to laws like the environmental and employment schemes discussed above. Even in the commercial context, where the same broad legislative purpose to protect public rights is not at stake, courts have carefully avoided striking down interrelated statutes. The fact that courts have successfully reconciled overlapping laws in fields as varied as agriculture, securities, bankruptcy, and intellectual property illustrates the strength of the harmonization principle. The ubiquity of overlapping laws also signals the potential for the *Ortiz* approach to create enormous disruption.

1. The harmonization principle's early development illustrates its wide application.

The fact that the mandate to reconcile overlapping laws developed in cases analyzing legal schemes having little to do with public rights suggests how far *Ortiz* has strayed from deeply established case law. Indeed, the focus on harmonization in commercial litigation cases should be even stronger in public rights cases, given the pre-existing, "well-recognized policy of the law to liberally construe remedial statutes." (*Viles v. State* (1967) 66 Cal. 2d 24, 32.) One of the first cases to succinctly describe how rarely courts should find implied repeal arose in the context of disputes between large agricultural businesses and the government over the setting of milk prices – showing the reach of the harmonization principle. (*United States v. Borden* (1939) 308 U.S. 188, 198 [reconciling overlapping liability between the Sherman Anti-Trust Act and Agricultural

Adjustment Act].) The U.S. Supreme Court recited the now-familiar rule that "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible," and concluded that the Agricultural Adjustment Act "afford[ed] no grounds for construing the Sherman Act as inapplicable" to the disputed conduct. (*Id.* at pp. 198, 202-03.)

Nearly fifty years later, the Supreme Court hewed closely to these same principles in another case involving the interpretation of agricultural laws, illustrating the consistency with which the Court has approached the construction of overlapping laws over time. (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986.) At first glance, the overlapping laws in *Ruckelshaus* appeared contradictory, yet the Court ultimately found them "capable of coexistence." (*Id.* at p. 1018 [harmonizing one law requiring businesses to submit valuable, proprietary data to the Department of Agriculture without compensation with a second law requiring just compensation for government taking of private property].) Noting no "clearly expressed congressional intention" that the laws could not coexist, the Court undertook its "duty" to find an interpretation that gave "force to both" laws. (*Id.*) The similar approaches taken by the Court in *Borden* and *Ruckelshaus* exemplify how the presumption against repeal by implication has maintained its strength and relevancy. The high court could not have reached the same result in either case using the *Ortiz* rule.

2. The fact that overlapping property laws and laws regulating the securities market have readily withstood scrutiny reinforces the *Ortiz* court's isolation.

The securities market provides yet another example of an industry governed by multiple overlapping laws with approval from the courts. The U.S. Supreme Court has

characterized the Securities Act of 1933 (15 U.S.C. §§ 77a-77mm) and the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a-78kk) as "interrelated components of the federal regulatory scheme governing transactions for securities." (*Ernst & Ernst v. Hochfelder* (1976) 425 U.S. 185, 206.) Given this common purpose, the Court has rejected the assertion that stock purchasers cannot seek a remedy under the 1934 Act just because the conduct "would apparently also provide the basis for a damage action under" the 1933 Act. (*Herman & MacLean v. Huddleston*, *supra*, 459 U.S. at p. 381; *see also Radzanower v. Touche Ross & Co.* (1976) 426 U.S. 148 [finding implied repeal "impossible" and "giving full effect" to both the Securities Exchange Act of 1934 and the National Bank Act despite substantial overlap].) To do so, the Court noted, would ignore the fact that a "cumulative construction of the securities laws also furthers their broad remedial purposes." (*Id.* at p. 386.) The ICRAA and the CCRAA, too, serve a unified remedial purpose and some overlap within complex regulatory schemes is "neither unusual nor unfortunate." (*Id.* at p. 383.)

California courts have also harmonized overlapping probate statutes by interpreting one to set forth the procedural requirements while the other defines the substance of a claim. (*Scott S. v. Sup. Ct.* (2012) 204 Cal. App. 4th 326, 331 [construing Cal. Welf. & Inst. Code, § 5358; Cal. Probate Code, § 2357].) Ironically, the *Scott* court cited *Ortiz* for the proposition that laws "relating to the same subject must be harmonized," before finding a construction that permitted two probate laws to remain intact. (*Id.* at p. 739; *see also Things Remembered, Inc. v. Petrarca*, *supra*, 516 U.S. at p. 125 [finding that two overlapping removal statutes governing bankruptcy clams can

"comfortably coexist"].) Clearly, the *Scott* court followed *Ortiz* in name only, since these probate laws received substantial deference where in *Ortiz* the ICRAA received none.

In the field of intellectual property law, too, defendants have attempted to use regulatory overlap to avoid liability or enforcement – and the U.S. Supreme Court has rejected these arguments. For example, one petitioner charged with copyright infringement claimed that only patent law applied to the disputed product. (*Mazer v. Stein, supra,* 347 U.S. at p. 216.) The petitioner argued that the "overlapping of patent and copyright legislation so as to give an author or inventor a choice between patents and copyrights should not be permitted." (*Id.*) The Court quickly rejected this argument, refusing to invent a conflict between the two intellectual property regimes since "[n]either the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted." (*Id.* at p. 217.)

The Court reached the same conclusion fifty years later, this time in the context of trade secrets and patents. (*J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, *supra*, 534 U.S. at p. 144.) As in *Mazer*, the petitioners suggested that "even when statutes overlap and purport to protect the same commercially valuable attribute of a thing, such 'dual protection' cannot exist." (*Id*.) Again, the Court disagreed, reminding the parties that it had "not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." (*Id.*) Applying that principle, the Court held that while patent and trade secrets laws "do contain some similar protections [], the overlap is only partial." (*Id.*) While a product might not satisfy the requirements for a patent, it "might still qualify for the lesser protections afforded by" trade secrets laws. (*Id.*) Thus, the

Court adopted an interpretation that gave the greatest possible effect to both laws. This reluctance to disrupt statutory schemes crafted by the political branches was sorely lacking in *Ortiz,* where the court made no attempt to keep intact the complementary and overlapping requirements in the ICRAA and the CCRAA.

State and federal courts alike have remained remarkably consistent in their analysis of overlapping laws across multiple fields. When faced with challenges to intersecting statutory schemes, they have employed a flexible and deferential style of statutory interpretation to avoid depriving laws of force, regardless of whether the disputed laws govern affordable development, employment discrimination, fraudulent transfers, or trade secrets. There is no reason to treat laws regulating consumer reporting any differently.

CONCLUSION

The ICRAA and the CCRAA can and must be harmonized and upheld. The doctrine of implied repeal, the proper framework for examining challenges to overlapping statutes, permits nothing less. The void for vagueness doctrine is inapplicable here because the ICRAA and the CCRAA both clearly define the conduct they require and prohibit. Embracing the novel and expansive "void for overlap" approach announced in *Ortiz* would depart from uniform and longstanding precedent across nearly every field of

law. *Amici* urge this Court to reject the unworkable and potentially destructive principles proposed by First Student and to uphold California's vital consumer reporting regime.

Dated: May 26, 2015 Respectfully submitted,

By: /s/ Seth E. Mermin .

SETH E. MERMIN, SBN 189194
THOMAS BENNIGSON SBN 237804
RACHEL A. FOODMAN
PUBLIC GOOD LAW CENTER
3130 Shattuck Ave.
Berkeley, CA 94705
Telephone: (510) 393-8254
TMermin@publicgoodlaw.org

Counsel for amici curiae

CERTIFICATE OF COMPLIANCE

I, Seth E. Mermin, counsel for *amici curiae*, hereby certify, pursuant to the California Rules of Court, Rule 8.204(c), that according to the word count in Microsoft Word, this brief contains 8,127 words, including footnotes and headings but exclusive of tables and signature blocks, this certificate of compliance, and the declaration of service.

DATED: May 26, 2015 By: /s/ Seth E. Mermin
Seth E. Mermin

PROOF OF SERVICE (Court of Appeal)
Mail, Electronic Service or Personal Service

Case Name: Connor et al. v. First Student et al.
Court of Appeal Case Number: B256075, B256077
Superior Court Case Number: No. JCCP 4624

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. My ☐ residence ☒ business address is *(specify):* Public Good Law Center
3130 Shattuck Ave., Berkeley CA 94705

My electronic service address is: TMermin@publicgoodlaw.org

3. I mailed, electronically served or personally delivered a copy of the as indicated below *(complete either a, b or c):*

a. ☒ **Mail.** I mailed a copy of the document identified above as follows:
b. ☒ **Electronic service.** I electronically served a copy of the document identified above as follows:
c. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

Date mailed, electronically served or personally served: May 26, 2015

(1) Name of Person served: Ronald Peters; Benjamin Emmert
On behalf of (*name or names of parties represented, if person served is an attorney):*
Defendants - Respondents First Student, Inc and First Transit, Inc.
(a) Address: Littler Mendelson, P.C.
50 W. San Fernando, 15th Floor
San Jose, CA 95113
(b) E-Mail Address: RPeters@littler.com; BEmmert@littler.com

(2) Name of Person served: Rod Fliegel; Amanda Fu
On behalf of (*name or names of parties represented, if person served is an attorney):*
Defendants-Respondants HireRight Solutions, Inc. and HireRight, Inc.
(a) Address: Littler Mendelson, P.C.
650 California Street, 20th Floor
San Francisco, CA 94108
(b) E-Mail Address: RFliegel@littler.com; AFu@littler.com

(3) Name of Person served: Catha Worthman; Todd Jackson
On behalf of (*name or names of parties represented, if person served is an attorney):*
Plaintiffs-Appellants Eileen Connor and Jose Gonzalez
(a) Address: Lewis, Feinberg, Lee & Jackson, P.C.
476 9th Street
Oakland, CA 94607
(b) E-Mail Address: cworthman@lewisfeinberg.com; tjackson@lewisfeinberg.com

4. I am a resident of or employed in the county where the mailing occurred. The document was served from *(city and state):* Berkeley, CA

☒ Additional persons served are listed on the attached page *(See page 3).*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: May 26, 2015

Seth Mermin
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

Case Name: Connor et al, v. First Student et al.
Court of Appeal Case Number: B256075, B256077
Superior Court Case Number: No. JCCP 4624

(4) Name of Person served: Hunter Pyle; Tanya Tambling
On behalf of (*name or names of parties represented, if person served is an attorney):*
Plaintiffs-Appellants Eileen Connor and Jose Gonzalez
(a) Address: Sundeen, Salinas & Pyle, P.C.
428 13th Street, 8th Floor
Oakland, CA 94612
(b) E-Mail Address: HPyle@ssrplaw.com; TTambling@ssrplaw.com

(5) Name of Person served: Hon. John S. Wiley
On behalf of (*name or names of parties represented, if person served is an attorney):*
Superior Court of Los Angeles County
(a) Address: 600 S. Commonwealth Ave.
Los Angeles, CA 90005
(b) E-Mail Address:

(6) Name of Person served: Michele Van Gelderen, Supervising Deputy Attorney General
Nicklas Akers, Senior Assistant Attorney General
On behalf of (*name or names of parties represented, if person served is an attorney):*
Attorney General Kamala Harris
(a) Address: 300 S. Spring St.
Los Angeles, CA 90013
(b) E-Mail Address: Michele.VanGelderen@doj.ca.gov; Nicklas.Akers@doj.ca.gov

(7) Name of Person served:
On behalf of (*name or names of parties represented, if person served is an attorney):*
(a) Address:
(b) E-Mail Address:

(8) Name of Person served:
On behalf of (*name or names of parties represented, if person served is an attorney):*
(a) Address:
(b) E-Mail Address: