No. S229428

IN THE
SUPREME COURT OF CALIFORNIA

EILEEN CONNOR
Plaintiff-Appellant,
v.
FIRST STUDENT, INC., et al.,
Defendants-Respondents

Court of Appeal, Second Appellate District, Case Nos. B256075, B256077
Los Angeles County Superior Court, Case No. JCCP 4624
(In re First Student, Inc. Cases)
The Honorable 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 PLAINTIFF-APPELLANT*

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

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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 Plaintiff-Appellant Eileen Connor.

This application is timely made, per Rule 8.520(f) 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 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 certain 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 statutes *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 breadth of the impact that First Student's interpretation of the void-for-vagueness doctrine could have on laws beyond the area of consumer reporting. There is nothing inherent in the *Ortiz* court's reading of the 14th Amendment's due process clause that would limit the decision's 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, and commercial law, to name but a few. The list of affected areas is long indeed.

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

III. CONCLUSION

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

Dated: April 27, 2016

Respectfully submitted,

By: _____

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INTRODUCTION AND SUMMARY OF ARGUMENT

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 merits considerable deference. Invalidation of overlapping laws is proper only where the laws irreconcilably conflict – a high bar that Defendants-Respondents First Student, Inc., et al (collectively First Student) have not met 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 precedent of this Court and the United States Supreme Court demands no 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, courts have regularly and repeatedly rejected constitutional challenges and instead worked to harmonize laws with overlapping coverage. 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 directly from

this long line of cases. Such a decision is all the more appropriate given this Court's mandate that "a remedial statute's protective purpose is to be construed liberally on behalf of the class of persons it is designed to protect." (*Pineda v. Williams–Sonoma Stores*, *Inc*. (2011) 51 Cal.4th 524, 530.)

Ignoring 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 distortion of the void-for-vagueness doctrine into a "void for overlap" or "one law at a time" principle stems from a single judicial decision, *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. Broad application of such a "void for overlap" 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 volumes of long-settled law. There is no reason to take that path. *Amici* ask that this Court confirm well-established principles of statutory interpretation, affirm the judgment of the Court of Appeal, and uphold the ICRAA.

INTEREST OF *AMICI CURIAE*

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.

California Reinvestment Coalition (CRC) has been advocating for fair and equal access to credit for all California communities since 1986. Over the past 30 years, CRC has grown into the largest state community reinvestment coalition in the country, with a current membership of 300 nonprofit organizations working for the economic vitality of low-income communities and communities of color. Among CRC's 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 served by CRC's members 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. HERA's work includes providing direct legal services on all forms of credit reporting problems. HERA promotes affordable and fair credit access, asset building and preservation. HERA fights abusive mortgage servicing, problems with homeowner associations, foreclosure, escrow and other homeowner problems, and predatory lending of all kinds. All of HERA's 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* in support of consumer interests in many California cases including, among others in this Court, *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (2011) and *Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006).

The **National Employment Law Project (NELP)** is a non-profit law and policy organization with more than 45 years of experience advocating for the employment rights of the nation's workers, including supporting laws and policies that reduce barriers to employment for people with arrest and conviction records. ICRAA provides important protections for consumers, including applicants with criminal records trying to reenter their communities by securing stable employment. 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 participation in 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 by the subjects of those reports. To upset that balance simply because statutes may have areas of overlap would unsettle the expectations of each organization and individual in California whose work touches on the law – that is, just about everybody.

Amici curiae 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 rejecting an interpretation of the Due Process Clause that could decimate established regulatory structures in virtually every substantive area of California law.

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 that they cannot continue to do so.

The history of the statutes' development makes clear their shared purpose and complementary (though overlapping) scope. When originally enacted, the ICRAA was limited to information "obtained through personal interviews." Although both laws contained strong protections, by 1998 the legislature had become troubled by the employment and tenant screening industries' "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. (Plaintiff-Appellant's Request for Judicial Notice (RJN), Exh. B at pp. 3-4.) To reflect these changes in the industry, the legislature 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." (RJN, 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.)

Defendants-Respondents First Student, Inc. and First Transit, Inc. (collectively "First Student") nevertheless assert that the overlap between the ICRAA and the CCRAA creates confusion that renders the ICRAA constitutionally invalid. (*See* Defendants-Respondents' Brief [Resps.' Br.] at p. 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 each requires. 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. 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 and at odds with longstanding precedent. It should be rejected.

I. THE DOCTRINE OF IMPLIED REPEAL OFFERS THE PROPER FRAMEWORK FOR ANALYZING OVERLAPPING STATUTES AND CONCLUSIVE SUPPORT FOR THE ICRAA AND THE CCRAA.

The doctrine of implied repeal, not void-for-vagueness, is the correct lens for analyzing the overlap between the ICRAA and the CCRAA. The doctrine of implied repeal requires that a court if possible harmonize "two acts upon the same subject," not discard one or the other of them. (*United States v. Borden Co.* (1939) 308 U.S. 188, 198.) Courts must "give effect to both [laws] if possible"; only if two laws are irreconcilable may a court find that one has been repealed by implication. (*Ibid*.) 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, may readily 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." (*Ibid.*) This is far from the case here. As the Court of Appeal found, "There is nothing in either the ICRAA or the CCRAA that precludes application of *both* acts to information that relates to both character and creditworthiness." (239 Cal.App.4th at pp. 530-551 [emphasis in original]).

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, this 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

legislature intended the 1998 amendments to the ICRAA to broaden protections for consumers. (RJN, Exh. F) In light of this purpose, it makes no sense to read the amendment, as First Student urges, to strip away the protections that the ICRAA provides. 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.) A long line of cases directs that statutes with a shared purpose be construed 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, 518-519 [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].) Ample precedent belies First Student's suggestion that there is "no authority supporting [the] argument that an employer needs to comply with the ICRAA's more stringent requirements." (Resps.' Br. at p. 39.)

This Court's recent decision in *Pacific Palisades* exemplifies the 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 the municipal government from enforcing compliance with two state laws. (*Id.* at p. 801.) The Court rejected that argument, emphasizing that the local law could reasonably 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. And, here as in *Pacific Palisades*, "significant state policies favor an interpretation" of the overlapping statutes that "does not deprive" any law of its force. (*Id.* at p. 803.)

The conclusion that overlapping laws "do not pose an either-or proposition" follows 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.) As the court of appeal noted, 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" the two statutes. (*Ibid*., quoted in *Connor*, 239 Cal.App.4th at p. 538.) Indeed, 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 consumer reporting industry with ever increasing access to personal information.

The U.S. Supreme Court has repeatedly endorsed overlapping laws that create multiple layers of protection, assuming "each reaches some distinct cases." (*J.E.M. Ag Supply*, *supra*, 534 U.S. at p. 144.) This dual protection principle extends broadly across the spectrum of regulated activities. (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, one of which triggers stricter penalties. 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 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.)

II. *ORTIZ* IMPROPERLY INTERPRETED THE VOID-FOR-VAGUENESS DOCTRINE, AND SHOULD BE OVERRULED.

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 this Court and the U.S. Supreme Court.[1] As Ms. Connor has argued – and as the Court of Appeal held – "*Ortiz* was wrongly decided." (*Connor*, *supra*, 239 Cal.App.4th at p. 532.)

The touchstone of the void-for-vagueness doctrine is reasonable notice. Under the due process clauses of the U.S. and California Constitutions (U.S. CONST., amend. XIV; CAL. CONST., art. I, § 7), a law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 567.) 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*

[1] Both federal and state law are relevant to this case. (*See* ABM 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]).)

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 Plaintiff-Appellant has amply demonstrated, the language of each individual statute is clear and well defined. (See, e.g., ABM at pp. 6-10.) 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.

Even if the two laws – and the need to comply with both – were not as clear as they in fact are, businesses like First Student can be expected to understand their requirements. 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 [federal Fair Credit Reporting Act (FCRA)], 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 [the federal] 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. 31.)[3]

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

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

[3] In addition to the two state laws at issue here, employers and others handling consumer credit reports need to be aware of the requirements of the federal Fair Credit Reporting Act, 15 U.S.C., §§ 1681- 1681x. See, e.g., *Brown v. Mortensen* (2011) 51 Cal.4th 1052 [FCRA does not preempt state laws governing privacy of consumer medical records].)

understand how to act when a report is subject to both statutes strains credulity. A distorted interpretation of the void-for-vagueness doctrine does not excuse compliance with the full – and clear – requirements of California law. A business, like an individual, ignores obviously applicable laws at its peril.

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

It is impossible to reconcile the reasoning of *Ortiz* with the ubiquity of overlapping state and federal laws. Adopting the flawed reasoning of the *Ortiz* decision would improperly transform the void-for-vagueness doctrine into a "void for overlap" or "one law at a time" 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 concocted 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.

A. Application Of The *Ortiz* Rule Would Require Courts, Contrary To Longstanding Precedent, To Strike Down Overlapping Criminal Laws.

Applying 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, 115-116.) 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. 115-116, 123.)[4] The 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. (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 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. 498-499.) Yet, as demonstrated in *Batchelder*, courts strive to reconcile even criminal laws. Since the ICRAA and CCRAA are *civil* statutes, the *Ortiz* court's lack of effort to harmonize the two laws is especially striking. (*Vill. of Hoffman Estates, supra*, 455 U.S. at p. 498 ["economic regulation is subject to a less strict vagueness test"].)

The overlapping criminal firearm laws upheld in *Batchelder* share key similarities with the ICRAA and the CCRAA. First, both pairs of laws overlap in the conduct they prohibit. Each of the laws in *Batchelder* prohibits receipt of a firearm that has traveled in interstate commerce under certain circumstances. (442 U.S. at pp. 118-119.) The

[4] First Student claims that it need not comply with the ICRAA 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. 38.) This argument is meritless. A statute need not reference similar, overlapping statutes to avoid impliedly repealing those sister statutes. For 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.

ICRAA and the CCRAA each 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 include one law with higher penalties than the other. In *Batchelder*, one law provided a five-year maximum sentence, while the second capped imprisonment at two years. (*Batchelder*, *supra*, 442 U.S. at pp. 118-19.) Similarly, the ICRAA imposes higher penalties than the CCRAA. (Compare Cal. Civ. Code, §§ 1786.50-60 with Cal. Civ. Code, §§ 1785.30-36.) Third, despite their overlap, both sets of 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*, *supra*, 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. (Cal. Civ. Code, §§ 1786.10-1786.40; 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. In *Batchelder,* the Court found no problem in the fact that "particular conduct may violate both [laws]," because the laws' overlap did "not detract from the notice afforded by each." (*Batchelder*, *supra*, 442 U.S. at p. 123.) Yet the *Ortiz* court failed to follow the high court's analysis and reached the opposite conclusion. 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. 612-613.) 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 are, as noted, 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 decisions from this Court bolsters that 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 stands conspicuously alone.

B. Adopting *Ortiz* Would Contradict The Well-Established Practice Of Upholding Overlapping Statutes That Foster Public Rights.

Judicial harmonization of overlapping statues is by no means limited to the criminal context. To the contrary, courts regularly uphold overlapping civil laws like the ICRAA and CCRAA. (*Vill. of Hoffman Estates*, *supra*, 455 U.S. at p. 498.) They do so in virtually every field of law – and they certainly do so with statutes, like the ICRAA and CCRAA, that are designed to foster and enhance public rights. (See *Viles v. State* (1967) 66 Cal.2d 24, 32 [noting the "well-recognized policy of the law to liberally construe remedial statutes"].) Thus courts regularly harmonize not only statutes governing labor and employment, but also laws advancing additional public rights like environment.

1. Labor and employment laws frequently overlap, providing workers with dual protection that courts consistently validate.

As employment lawyers well know, it is the norm, not the exception, for a plaintiff bringing an employment lawsuit to bring claims grounded in multiple, overlapping state and federal laws. (See *Brown v. Superior Court*, *supra*, 37 Cal.3d at pp. 486-487.)

Neither the U.S. nor the California Constitution constitutes a barrier to such a 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 based either on sex or on medical disability related to pregnancy, the recently enacted Pregnancy Disability Leave Law (PDLL) offers broader remedies to

women facing pregnancy discrimination. (Cal. Gov't Code, §§ 12940, 12945.) Rejecting arguments that the enactment of the PDLL diminishes the 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].)

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. 486-487.) 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." (*Ibid.*) 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. (*Ibid.*) Yet the rule in *Ortiz*, which would eliminate the protections 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 this Court. When the legislature enacts a law to confer specific safeguards on a class of people whom it deems in need of such protection, courts should not lightly interpret that law in a way that would dilute its protective effect.

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.) This Court rejected that claim, determining 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." (*Ibid.*)

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. 519-520.) The high 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." (*Ibid.*) Moreover, employers could protect themselves by "applying the higher requirement" of the two laws to satisfy both. (*Ibid.*)

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.

There is no need to adopt such aberrant reasoning, either in cases involving employment statutes or in cases addressing any other type of law.

2. Courts regularly approve environmental laws that require compliance with complex, overlapping provisions.

To take an example outside employment law: 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.[5] And the Supreme Court has explicitly refused to interpret them in a way that reads a given layer of protection out of existence. (See, e.g., *Envt'l Def. Fund v. Duke Energy Corp.* (2007) 549 U.S. 561, 581 [noting that collapsing the more restrictive statute into the less restrictive would be an "implicit invalidation" of the newer and more effective statute].) This Court likewise follows the rule of statutory construction favoring harmonization. (See, e.g*., Pac. Palisades Bowl Mobile Estates, supra,* 55 Cal.4th at p. 803 [holding that

[5] 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.

the "significant state policies" behind three different California environmental laws[6] compelled an interpretation that gave "force and effect to all of their provisions"].)

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 to an interpretation imposing greater requirements on entities covered by these laws, rather than limiting their obligations. (See *ibid*. [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." (*Ibid.*)

C. Courts Routinely Uphold Overlapping Commercial Laws, Underscoring The Ubiquity Of The Harmonization Principle.

The judicial preference for harmonization rather than invalidation of overlapping statutes is not limited to public rights laws, which merit particular deference. Even in the commercial context, where individual and public rights are 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

[6] California Coastal Act (Cal. Pub. Res. Code, §§ 30000-30900); Mello Act (Cal. Govt. Code, §§ 65590 & 65590.1); Subdivision Map Act (Cal. Govt. Code, §§ 66410-66499.37).

principle. The vast number and variety of overlapping laws also signal the potential for the *Ortiz* approach to create enormous disruption.

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

Though the focus on harmonization is at its height in public rights cases, the principle has taken root in the context of commercial litigation as well. Indeed, one of the first decisions to 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. (*United States v. Borden* (1939) 308 U.S. 188, 198 [reconciling overlapping liability between the Sherman Anti-Trust Act and the Agricultural Adjustment Act].) It was in *Borden* that the U.S. Supreme Court developed 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 the 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. (See *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986.) Though at first glance the overlapping laws in *Ruckelshaus* appeared contradictory, the Court ultimately found them "capable of coexistence." (*Id.* at p. 1018 [harmonizing one statute requiring businesses to submit valuable, proprietary data to the Department of Agriculture without compensation

with a second statute 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. (*Ibid.*) 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.

2. Consistent approval of overlapping property laws and securities laws 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*, *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." (*Herman & MacLean*, *supra*, 459 U.S. 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].)[7]

In the field of intellectual property law, too, defendants have pointed to regulatory overlap to attempt 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 and 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." (*Mazer v. Stein, supra,* 347 U.S. at p. 216.) The Court 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.)

Half a century later, the Court reached the same conclusion, this time in the context of trade secrets and patents. (*J.E.M. Ag Supply, Inc.*, *supra*, 534 U.S. at p. 144.)

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[7] 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.

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." (*Ibid*.) 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." (*Ibid.*) Applying that principle, the Court held that while patent and trade secrets laws "do contain some similar protections [], the overlap is only partial." (*Ibid.*) If a product does not satisfy the requirements for a patent, it "might still qualify for the lesser protections afforded by" trade secrets laws. (*Ibid.*) 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. (157 Cal.App.4th at pp. 618-619.)

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, especially since "[t]he rule of law in the construction of remedial statutes requires great liberality, and wherever the meaning is doubtful, it must be so construed as to extend the remedy." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269.)

Against the backdrop of this comprehensive and consistent caselaw, the *Ortiz* decision and its few progeny stand alone. 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. 614-616.) Rather than seeking to harmonize the statutes, *Ortiz* manufactured confusion between them. (*Id.* at pp. 618-619.) 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. (*Ibid.*) And rather than giving force to all statutory provisions and requiring that companies continue to observe a law that they had understood and complied with for years, *Ortiz* called for removal of an essential part of California's consumer reporting regime. (*Ibid.*)

CONCLUSION

Ortiz was wrong when it was decided, and it is wrong today. The judgment of the Court of Appeal should be affirmed.

Dated: April 27, 2016 Respectfully submitted,

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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 7,624 words, including footnotes and headings but exclusive of tables and signature blocks, this certificate of compliance, and the declaration of service.

DATED: April 27, 2016 By: _____
Seth E. Mermin

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I, Seth E. Mermin, hereby certify that: I am over the age of 18 and not a party to this action. I am a resident of or employed in the county where the mailing occurred. My business address is Public Good Law Center, 3130 Shattuck Ave., Berkeley, CA 94705. My electronic service address is TMermin@publicgoodlaw.org.

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On April 27, 2016, I placed a true copy of the document described above, enclosed in a sealed envelope, in a designated area for outgoing mail, addressed as set forth below:

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

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