No. 12-57246

In the United States Court of Appeals for the Ninth Circuit

GABRIEL FELIX MORAN,

Plaintiff-Appellant,

v.

THE SCREENING PROS, LLC, a California Corporation,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR APPELLANT GABRIEL FELIX MORAN

Joshua E. Kim
A NEW WAY OF LIFE REENTRY PROJECT
P.O. Box 875288
Los Angeles, CA 90087

Devin H. Fok
LAW OFFICES OF DEVIN H. FOK
P.O. Box 7165
Alhambra, CA 91802

Craig Davis
LAW OFFICES OF CRAIG DAVIS
524 Union Street, Suite 358
San Francisco, CA 94133

Deepak Gupta
Peter Conti-Brown
GUPTA BECK PLLC
1625 Massachusetts Avenue, NW
Washington, DC 20036
(202) 888-1741

Meredith Desautels
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA
131 Steuart Street, Suite 400
San Francisco, CA 94105

Counsel for Plaintiff-Appellant Gabriel Felix Moran

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INTRODUCTION

Because consumer reporting agencies collect and disseminate information about nearly every aspect of Americans' lives, their activities can cause great harm to individual privacy if left unchecked. At the same time, our economy depends on accurate consumer reports. Fair credit reporting laws at both the state and federal level seek to balance those competing interests.

In California, the balance is struck by two statutes: the Consumer Credit Reporting Agencies Act and the Investigative Consumer Reporting Agencies Act. The district court in this case—mistakenly considering itself "bound" by a state court's mistaken understanding of federal constitutional law—held the latter Act unconstitutional under the void-for-vagueness doctrine. Its reasoning was that the two statutes overlap and the court could not decide which one applied. But the void-for-vagueness doctrine applies only when citizens are denied a reasonable opportunity to know what conduct is prohibited, so they can conform their conduct to the law. Here, the two California statutes *both* prohibit *identical* conduct. The U.S. Supreme Court rejected an attempt to apply the vagueness doctrine to precisely this kind of scenario in *United States v. Batchelder*, 442 U.S. 114, 123 (1978). *Batchelder* alone compels reversal. Here, as there, the law "clearly defines what conduct is prohibited and the potential range of fine that accompanies noncompliance." *Harris v. Mexican Specialty Foods*, 564 F.3d 1301, 1311-12 (11th Cir. 2009).

The district court also erred in its interpretation of the Fair Credit Reporting Act, the federal counterpart to the two California statutes. A key FCRA provision protects consumers from the inclusion in their consumer reports of certain obsolete information that "antedates the report by more than seven years." 15 U.S.C. § 1681c(a). The Screening Pros, a company that sells tenant-screening reports, included a decade-old misdemeanor charge, later dismissed without a conviction, in plaintiff Gabriel Moran's consumer report. Initially, the district court held that this inclusion of a decade-old charge was in "stark inconsistency" with "the plain text of the modern FCRA." But the court later reversed itself, relying on Federal Trade Commission commentary from 1990.

The district court was right the first time. Its second decision contravenes a black-letter principle of administrative law: Agency interpretations get no deference when they conflict with the statute's text. Moreover, the agency commentary on which the court relied interpreted language from an *older* version of the statute—language that Congress deliberately removed in a 1998 amendment—and the agency has since rescinded the commentary, describing it as "stale[]" and "partially obsolete" in light of subsequent amendments. But even if the commentary were still valid, the district court's reliance on it could not be justified. An agency's interpretation of statutory provisions that no longer exist cannot trump the text of statutory provisions that do.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 15 U.S.C. § 1681p and 28 U.S.C. § 1331. This Court has subject-matter jurisdiction under 28 U.S.C. § 1291. The district court issued its opinions and orders dismissing the complaint in its entirety on September 28, 2012 and November 20, 2012. Moran timely filed his notice of appeal on December 11, 2012.

STATEMENT OF THE ISSUES

The district court dismissed Moran's complaint based on two holdings: (1) that California's Investigative Consumer Reporting Agencies Act (ICRAA) is unconstitutionally vague and (2) that the Fair Credit Reporting Act (FCRA) permitted the disclosure of a misdemeanor charge that predated the consumer report by almost ten years. Those two holdings give rise to two issues:

1. In 1998, California's legislature amended the ICRAA to prohibit, in part, conduct already illegal under the Consumer Credit Reporting Agencies Act (CCRAA). Did the district court correctly conclude that the ICRAA is unconstitutionally vague because it prohibits conduct already illegal under the CCRAA? And if not, should the dismissal of Moran's request for injunctive relief also be reversed to the extent that his request was premised on alleged violations of the ICRAA?

2. The FCRA prohibits the reporting of any adverse information that predates the consumer report by more than seven years, subject to certain exceptions. Did the FCRA permit the disclosure of a ten-year-old misdemeanor charge that did not lead to a conviction?

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. California's Fair Credit Reporting Laws.

In 1975, California recognized that consumer reporting agencies needed to "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." Cal Civ. Code §§ 1785.1, 1786. To that end, the Legislature passed the Consumer Credit Reporting Agencies Act (CCRAA) and the Investigative Consumer Reporting Agencies Act (ICRAA). The CCRAA regulates "consumer credit reports," defined, in relevant part, as "any written, oral or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity." Cal. Civ. Code § 1785.3(c). As originally enacted, the ICRAA governed "investigative consumer reports," defined at the time as reports "in which information on a consumer's character, general reputation, personal characteristics, or mode of living is *obtained through personal interviews*." Cal. Civ. Code § 1786.2(c) (1975) (emphasis added).

Initially, the legislature meant for the two statutes to focus on distinct reports, and therefore specifically excluded investigative consumer reports from the CCRAA's reach. Cal. Civ. Code § 1785.3(c). In 1998, however, the legislature expanded the scope of the ICRAA to subject a broader range of consumer reports to the ICRAA's stricter requirements and increased penalties. To accomplish this, the Legislature changed the ICRAA's definition of an "investigative consumer report" to refer to those reports that contain "information on a consumer's character, general reputation, personal characteristics, or mode of living . . . *obtained through any means*." *Id.* § 1786.2(c) (emphasis added). The exclusion in the CCRAA, however, was not amended, so the ICRAA still exclusively governs reports that solely contain information "obtained through personal interviews." *Id.* § 1785.3(c). There are also certain consumer reports that are excluded from the ICRAA's reach. For example, CCRAA exclusively governs any report that is to be used solely to evaluate a consumer's eligibility for credit, or that is limited to specific factual information obtained directly from creditors relating to a consumer's credit record. *Id.* §§ 1785.3(c)(1), 1786.2(c).

But after the 1998 amendment to the ICRAA, many consumer reports now qualify as both "consumer credit reports" and "investigative consumer reports," and are thus subject to the requirements and penalties of both statutes. For example, both the CCRAA and the ICRAA govern consumer reports that are to be used to screen tenant applicants in connection with the "hiring of a dwelling unit." *Id.* §§ 1785.3(c)(3), 1786.2(b). And most, if not all, of the categories of information reported in tenant-screening reports qualify as both creditworthiness and general character information. In fact, both the CCRAA and the ICRAA contain specific rules about the reporting of many such overlapping categories of information, including criminal records, unlawful detainers, bankruptcy filings, and tax liens. *See* Cal. Civ. Code § 1786.18 (ICRAA); *id*. § 1785.13 (CCRAA).

B. The Fair Credit Reporting Act

Congress enacted the Fair Credit Reporting Act (FCRA) to protect the "consumer's right to privacy" by ensuring "the confidentiality, accuracy, relevancy, and proper utilization" of consumer credit information. 15 U.S.C. § 1681(b). One way the Act accomplishes that objective is to render obsolete any adverse information that predates the relevant consumer report by seven years or more. *Id.* § 1681c(a). The FCRA contains certain exceptions to this seven-year rule. For example, bankruptcy cases can be disclosed if they predate the report by up to ten years, *id*. § 1681c(a)(1), and "convictions of crimes" can always be disclosed, 15 U.S.C. § 1681c(a)(5). There is no exception in the statute that would apply to the reporting of a misdemeanor charge that did not result in a conviction.

Before an extensive revision in 1998, the FCRA's treatment of adverse information was very different:

> [N]o consumer reporting agency may make any consumer report containing any of the following items of information:
>
> . . .
>
> (5) Records of arrest, indictment, or conviction of crime which, from the date of disposition, release, or parole, antedate the report by more than seven years.
> (6) Any other adverse item of information which antedates the report by more than seven years.

15 U.S.C. § 1681c(a) (1997).

In 1990, the Federal Trade Commission—the agency in charge of administering the FCRA at the time—issued a commentary to "clarify how the Commission [would] construe the FCRA." *Commentary on the Fair Credit Reporting Act*, 16 C.F.R. Point. 600, App. (1990). The agency's comment to then-section 1681c(a)(5) gave that paragraph a commonsense reading: "The seven year [*sic*] reporting period runs from the date of disposition, release or parole, as applicable. For example, if charges are dismissed at or before trial, or the consumer is acquitted, the date of such dismissal or acquittal is the date of disposition." 16 C.F.R. Pt. 600, App. 605(a)(5) (1990).

With the 1998 amendment, Congress effectively rewrote section 1681c(a)(5). *See* Consumer Reporting Employment Clarification Act, Pub. L. No. 105-347, § 5, 112 Stat 3208 (Nov. 2, 1998). The relevant provisions of section 1681c(a) now read:

> [N]o consumer reporting agency may make any consumer report containing any of the following items of information:
>
> . . .

> (2) Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.
>
> . . .
>
> (5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.

15 U.S.C. § 1681c(a) (2013).

The amendment reflects two changes relevant to this appeal: (1) it removed any reference to "indictment" in the entire statute, and (2) it removed the "date of disposition" as relevant to the seven-year window. (It also created an exception to the expiration period for "convictions of crimes," which may now be included in reports regardless of the date of conviction.) In its current form, then, the FCRA bars the inclusion of any adverse information beyond the seven-year period, with certain exceptions that are not relevant here. *Id.*

In July 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010). Dodd-Frank transferred interpretive authority over the FCRA from the Federal Trade Commission to the newly formed Consumer Financial Protection Bureau. *Id.* § 1088 (codified at 15 U.S.C. § 1681a(w)). A year later, the Commission rescinded its 1990 commentary.[1] It explained that "significant changes in the FCRA, as well as the passage of time," had rendered the 1990 Commentary "partially obsolete." 76 Fed. Reg. at 44,463. It added that it "does not believe that it is appropriate to transfer the Commentary given its staleness. Indeed, in some respects, the Commentary is in conflict with the law as it has been amended." *Id.* The Commission intended with the Commentary and the 2011 Staff Summary to provide "a compendium of interpretations that [the Commission] believes will be of use to the [the Consumer Financial Protection Bureau] staff" and other interested parties. 2011 Staff Summary at 7.

II. Factual Background

The Screening Pros is a company that provides tenant-screening reports to landlords. ER 21 ¶ 5. In February 2010, Moran applied for housing with Maple Square, an affordable-housing development. ER 55 ¶ 33. Maple Square hired the company to provide a background check report that included a traditional credit history, but also provided details regarding Moran's criminal history.

This litigation focuses on the disclosure of two items from Moran's history. First, the background-check report indicated that on May 16, 2000, Moran was

[1] Federal Trade Commission, Statement of General Policy or Interpretation; *Commentary on the Fair Credit Reporting Act*, 76 Fed. Reg. 44,462, 44,463 (July 26, 2011); Federal Trade Commission, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* (July 2011) ("2011 Staff Summary"), available at: http://www.ftc.gov/os/2011/07/110720fcrareport.pdf.

charged with a misdemeanor of which he was never convicted, and that was dismissed on March 2, 2004. ER 67; ER 55 ¶ 36. Second, the report indicates that on June 4, 2006, Moran was charged with second-degree burglary, forgery, and embezzlement. ER 67-68. The report also indicated that the first two counts were dismissed, whereas the third led to conviction. *Id.*

Because of information in The Screening Pros' report, Maple Square denied Moran's rental application. ER 56 ¶ 48. Moran disputed the report in writing, but The Screening Pros failed to investigate and respond to Moran's concerns. ER 57 ¶¶ 49-51. The effect of The Screening Pros' report was devastating to Moran. Because he lives on "extremely modest means" and depends on his fixed income from Social Security, he "desperately needed the affordable housing opportunity provided by Maple Square." ER 13 ¶ 3. That the denial of this opportunity was the result of a decade-old misdemeanor charge was "particularly troubling" to Moran because he had gone to great effort, "with the help of [his] church and various community organizations," to escape his history of drug and alcohol dependence, make amends for his past actions, and seek housing and employment opportunities—in short, to "turn [his] life around." ER 13 ¶¶ 9, 14.

III. Proceedings and Decisions Below

Moran then retained the assistance of A New Way of Life Reentry Project, a non-profit organization dedicated to lowering barriers to successful reentry of people with criminal records through, among other things, civil litigation aimed at bringing the background check industry into compliance with state and federal consumer reporting laws. Moran sued The Screening Pros under the FCRA, the ICRAA, and California's Unfair Competition Law. Moran did not sue under the CCRAA, even though the conduct alleged is also illegal in almost every instance under that statute.

Moran's complaint, as amended, lists eleven claims. The first three arise under the FCRA, the next six under the ICRAA, and the final two under the Unfair Competition Law. The Screening Pros' alleged misconduct includes eight actions, all of which violate the ICRAA and some of which also violate the FCRA:

- The Screening Pros disclosed the 2000 misdemeanor charge, which did not result in conviction and predated the report by more than seven years, in violation of the FCRA and the ICRAA. 15 U.S.C. § 1681c; Cal. Civ. Code § 1786.18.
- The company disclosed the burglary and forgery charges, which did not result in conviction, in violation of the ICRAA. *Id.* § 1786.18.
- It also failed to have reasonable procedures to avoid those illegal disclosures, in further violation of the FCRA and the ICRAA. 15 U.S.C. § 1681e(a); Cal. Civ. Code § 1768.20(a).

- It failed to assure maximum possible accuracy of the information it disclosed, in violation of the FCRA and the ICRAA. 15 U.S.C. § 1681e(b); Cal. Civ. Code § 1786.20(b).
- It failed to obtain proper certification from Maple Square before issuing the report, in violation of the ICRAA. *Id.* § 1786.12(e).
- It failed to conduct any reinvestigation after Moran disputed the accuracy of the report, in violation of the ICRAA. *Id.* § 1786.24.
- It failed to include in the report the source of its information, in violation of the ICRAA. *Id.* § 1786.28.
- It failed to include the required notice on the first page of the report, in violation of the ICRAA. *Id.* § 1786.29.

The conduct above also independently violates the CCRAA in almost every respect: only the failure to include a notice on the first page of the report is uniquely prohibited by the ICRAA. *See* Cal. Civ. Code §§ 1785.13 (prohibiting inclusion of misdemeanor charge outside seven-year period and charges that did not result in conviction); 1785.14 (requiring reasonable procedures designed to avoid violations, assurance of maximum possible accuracy and proper certification); 1785.18 (requiring the agency to identify the source of any public record used in the report).

The Screening Pros moved to dismiss ten of eleven claims. For the ICRAA claims—six of the eleven—the district court agreed, determining that it was "bound" to follow a California Court of Appeal decision that had invalidated the ICRAA as unconstitutionally vague. *See Ortiz v. Lyon Mgmt. Grp., Inc.*, 69 Cal. Rptr. 3d 66, 70 (Ct. App. 2007). The district court reasoned that *Ortiz* applied "with equal force" to the facts here, and that the only question to decide was whether criminal charges could be both character and credit information. Concluding that it could, the district court held that the ICRAA was unconstitutional in its entirety because it overlapped in part with the CCRAA, rendering the ICRAA void for vagueness.

The Screening Pros also argued that it had not violated the FCRA by disclosing the ten-year-old dismissed misdemeanor. At first, the district court did not accept the company's contention that this disclosure was timely under the statute. The court acknowledged that the issue was "a matter of first impression," ER 38, but dismissed the company's argument that it must defer to the Federal Trade Commission's 1990 Commentary on a statute Congress amended in 1998. The court concluded instead that "[t]he statute . . . looked markedly different" in 1990 than it did in 2012, and that the Commission's recommendation referred to statutory language Congress excised in 1998. ER 39. Because of the 1998 amendment, the Commission's "1990 commentary . . . lost its force." ER 39.

But on the company's motion for reconsideration, the district court accepted the argument that the 1990 Commentary rendered the inclusion of the misdemeanor charge legal under the FCRA as amended in 1998. To explain its reversal, the district court cited the Commission's 2011 Staff Summary and its reference to an endnote that suggested that the Commission's "1990 comments referenced in [the 2011 Staff Summary's] endnotes 'will assist readers' as an interpretive source.'" ER 8. Because one such endnote referenced the 1990 Commentary's interpretation of the pre-1998 FCRA, the district court determined that it was bound by it. The court accordingly dismissed the complaint's three remaining FCRA counts.[2]

The district court also dismissed Moran's plea for injunctive relief under the Unfair Competition Law.[3] The district court concluded that the FCRA preempts any state law provision of injunctive relief based on FCRA violations. Presumably because the court had just held the ICRAA was unconstitutional, it did not address Moran's claims for injunctive relief based on conduct that violated the ICRAA.

[2] The second count claimed that Screening Pros violated 15 U.S.C. § 1681e(b), which requires a consumer-reporting agency to "follow reasonable procedures to assure maximum possible accuracy of the information." ER 58 ¶¶ 64-65. Moran argued that Screening Pros violated section 1681e(b) by both disclosing the ten-year-old misdemeanor and by including all three charges from the 2006 indictment. ER 41. The district court rejected both arguments; Moran appeals only the district court's opinion on the first one.

[3] Moran also sought restitution under the Unfair Competition Law. The district court dismissed that request and Moran does not appeal that aspect of the court's decision.

SUMMARY OF THE ARGUMENT

I. A. The district court was wrong to conclude that California's Investigative Consumer Reporting Agencies Act is unconstitutional under the void-for-vagueness doctrine. That doctrine is meant to require that specific statutory provisions be sufficiently clear so that the public has notice regarding the line between legal and illegal activity. Statutes whose terms don't clearly identify that line in a way that a person of ordinary intelligence can understand may be unconstitutionally vague. But the ICRAA and CCRAA *both* prohibit *identical* conduct in almost every respect; they only provide different penalties for that conduct.

And where their requirements are not identical, the two statutes are consistent: fulfilling the more exacting requirements under the ICRAA necessarily means following the CCRAA. The overlap between the ICRAA and the CCRAA therefore doesn't render either statute unconstitutional; it represents only California's intent to give discretion to those who enforce the statutes. The district court's application of the void-for-vagueness doctrine would insert the judiciary into the legislative process in every area of law governed by more than one statute. If The Screening Pros would prefer that the ICRAA not provide discretion in the private enforcement of California's consumer credit reporting system, its gripe is with the California legislature.

The Supreme Court confronted and rejected a similar attempt to shoehorn a challenge into the void-for-vagueness doctrine in *United States v. Batchelder*, 442 U.S. 114, 123 (1978). And there, the overlapping statutes were deemed constitutionally sound even though their penalty provisions were seemingly in *conflict*. No such conflict exists here. The district court's opinion runs headlong into *Batchelder*'s rule regarding allegedly conflicting statutory penalties and the void-for-vagueness doctrine. It must therefore be reversed.

B. The correct lens for analyzing two allegedly conflicting statutes is not unconstitutional vagueness, but the presumption against implied repeals. Under that presumption, courts must construe two allegedly conflicting statutes in a way that harmonizes their terms unless there is an irreconcilable conflict. Under that analysis, there is no question of the ICRAA's force: not only do the two statutes not conflict, they are identical in the conduct they proscribe in all but one instance. And in that last instance, the ICRAA's requirement is in addition to—but not in any conflict with—those imposed by the CCRAA.

C. The district court was led astray because it believed itself "bound" by the conclusion of one of the California Courts of Appeal in *Ortiz v. Lyon Management Group, Inc.*, 69 Cal. Rptr. 3d 66, 70 (Ct. App. 2007), that the ICRAA is unconstitutionally vague. But that court's decision was neither binding nor correct. The Screening Pros does not identify the specific constitutional basis for its void-for-vagueness argument, but its reliance on *Ortiz*—which referenced federal cases and state cases based overwhelmingly in federal law—indicates that the process due is governed by federal law. Even if *Ortiz* were based on state constitutional law, the California Supreme Court's precedents are consistent with this fundamental and commonsensical notion: the void-for-vagueness doctrine is about making specific statutory provisions clear enough such that citizens of ordinary intelligence can discern the line between legal and illegal activity. It is no refuge for those who would break the law and then seek protection from that violation because the legislature has provided various penalties for that violation.

D. Presumably because it had just concluded that the ICRAA was unconstitutional, the district court did not analyze Moran's claims for injunctive relief under California's Unfair Competition Law on the basis of the alleged ICRAA violations. The district court concluded instead that the FCRA preempted the Unfair Competition Law claims and dismissed the claims. If this Court agrees that the district court misfired in its application of the void-for-vagueness doctrine in this case, it should reinstate Moran's claims for injunctive relief on the basis of the ICRAA claims.

II. A. The FCRA prohibits the disclosure of any adverse information that predates the report by more than seven years, subject to certain exceptions not relevant here. Because Moran was charged but not convicted of a misdemeanor outside the seven-year window, the inclusion of that charge violated the FCRA. The district court initially agreed; its contrary decision on reconsideration must be reversed as inconsistent with the FCRA.

B. The district court's decision on reconsideration concluded that 1990 commentary from the Federal Trade Commission trumped the statute's contrary language. That decision violates the elementary principle that agencies get no deference when their interpretations conflict with the statute's language. But here, there is not even agency interpretation in conflict with the statute: the Commission freely admitted that its commentary was out of date, and that the FCRA renders obsolete the Commission's previous conclusions regarding the date at which the beginning of the FCRA's seven-year window would begin for crimes that did not result in a conviction. And because the Commission's role has been displaced by the newly formed Consumer Financial Protection Bureau, it is up to that new agency—and only that new agency—to provide authoritative guidance on the statute.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal for failure to state a claim, *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005), and summary judgment, *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004). Where, as here, a state statute is challenged on the basis of federal constitutional law, this Court "owe[s] no deference to state courts." *Vandevere v. Lloyd*, 644 F.3d 957, 964 (9th Cir. 2011); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9-21 (1978). Because the district court decided the constitutional challenge to the ICRAA on a motion to dismiss, this court "accept[s] as true the facts alleged in the complaint." *Gutierrez v. Advanced Medical Optics, Inc.*, 640 F.3d 1025, 1027 (9th Cir. 2011).

ARGUMENT

I. CALIFORNIA'S INVESTIGATIVE CONSUMER REPORTING AGENCIES ACT IS NOT UNCONSTITUTIONALLY VAGUE.

The district court, mistakenly deeming itself "bound" by an intermediate state court's mistaken understanding of federal constitutional law, held that the void-for-vagueness doctrine renders the ICRAA unconstitutional because it overlaps with another state statute. But the void-for-vagueness doctrine applies when a statute deprives citizens of ordinary intelligence of the ability to know what conduct the law prohibits. Where, as here, two separate statutes both prohibit the same conduct, there is no way anybody could be confused about how to follow the law.

A. California's Credit Reporting Laws Provide Fair Notice of the Line Between Legal and Illegal Conduct.

A "statute is unconstitutionally vague if it fails one of two tests: 'First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.'" *SEC v. Gemstar-TV Guide Intern., Inc.*, 401 F.3d 1031, 1048 (9th Cir. 2005) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). The requirement that statutes "give fair notice of conduct that is forbidden or required" is "fundamental." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). In an iconic articulation of the doctrine, the Supreme Court explained that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws 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*, 408 U.S. 104, 108 (1972).

The Screening Pros does not argue that the existence of either the CCRAA or the ICRAA, respectively, makes the other statute's provisions unclear to a "person of ordinary intelligence." *Id*. There is nothing vague about the prohibitions that exist in both statutes, and (as explained further below) the conduct proscribed by the ICRAA underlying five of the six counts is also forbidden by the CCRAA. Rather than argue that the ICRAA's specific terms are vague, The Screening Pros insists that its clear terms become vague because the CCRAA has the same prohibitions.

There is no logic to the position that clear statutory prohibitions become unconstitutionally vague because the legislature wrote them down twice. The void-for-vagueness doctrine determines whether *specific* statutory provisions fail to provide the notice required by due process of "what the state commands or forbids," but "[t]he particular context is all important." *Am. Commc'ns Ass'n, CIO v. Douds*, 339 U.S. 382, 412 (1950). The doctrine does not sanction a wholesale attack on an entire statutory scheme. *See Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972).

In *United States v. Batchelder*, the Supreme Court confronted—and rejected—a much more plausible attempt to rejigger the vagueness doctrine into a weapon for attacking clear statutory prohibitions. 442 U.S. 114, 116 (1978). The defendant in *Batchelder* challenged two overlapping and even contradictory provisions of federal criminal law that prohibited "convicted felons from receiving firearms." *Id*. One provision imposed a maximum sentence of five years; another allowed a maximum of only two years. The defendant argued that the conflict between the two provisions rendered the statute that served as the basis for his five-year sentence unconstitutionally vague. *Id*. at 117-18.

The Court rejected the argument in a unanimous opinion. On the Court's reading, "each substantive statute, in conjunction with its own sentencing provision, operates independently of the other." *Id*. at 118. It did not matter that the proscribed conduct was identical, nor that Congress permitted a two-year maximum sentence under the first statute but a five-year sentence for the same conduct under the second. "So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized," the Court wrote, "the notice requirements of the Due Process Clause are satisfied." *Id.* at 123.

Batchelder alone compels reversal of the district court's decision. In *Batchelder*, there was an actual conflict: the same conduct subjected a defendant to a *maximum* sentence of two years on the one hand, but on the other hand permitted a violation of that maximum. Moreover, the challenged laws were penal statutes, where the "consequences of imprecision … are qualitatively [more] severe" than under an economic statute. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982); *see Trans Union Corp. v. Fed. Trade Comm'n*, 245 F.3d 809, 817 (D.C. Cir. 2001) ("[B]ecause the FCRA's regulation of consumer reporting agencies is economic, it is subject to 'a less strict vagueness test.'"). Even there, the Court found no constitutional violation because the language of the statutes was clear.

Here, in contrast, there is no conflict at all. In most cases, in fact, the requirements are identical. Moreover, the statutes are "subject to a less strict vagueness test" because there is no threat of criminal punishment, and because "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id.* (footnotes omitted). If the criminal defendant facing an extension to his incarceration of more than three years under conflicting statutes can get no relief from the void-for-vagueness doctrine, the lack of conflict between the ICRAA and CCRAA cannot be the basis for the doctrine's extension.

In truth, The Screening Pros is not really troubled by any presumed vagueness in the ICRAA—it has never, after all, identified a single vague provision in the statute. The company's real issue is that the Legislature has afforded discretion in the enforcement of these statutes. As an alternative to that discretion, the company would create out of whole cloth a new constitutional rule that makes the judiciary, not the legislature, the institution in charge of determining the best means of accomplishing legislative policy goals. Whatever the merits of providing a menu of enforcement options within a statutory framework as a matter of policy, the void-for-vagueness doctrine does not provide an avenue for judicial invalidation of the legislature's policy decision to allow discretion in that enforcement.

To be sure, legislatures can trigger vagueness concerns by writing statutes so broadly that they grant discretion that only "encourages arbitrary and erratic" enforcement. *Papachristou*, 405 U.S. at 162-63 (discussing ordinances criminalizing "nightwalking" and "loafing"). But forbidding the exercise of arbitrary discretion does not mean that no discretion is ever appropriate. The Supreme Court has recently made that dynamic explicit. In *United States v. Skilling*, the Supreme Court upheld as applied the federal honest-services statute precisely *because* it overlapped with other federal statutes. As the Court explained it, there is "no significant risk that the honest-services statute, as we interpret it today," will lead to "arbitrary prosecutions." 130 S. Ct. 2896, 2933 (2010). This was true because duplicative "federal statutes proscribing—and defining—similar crimes" informed the way that prosecutors and courts would define the honest-services statute. *Id*. at 2933-34.

Even in the consumer-credit context, discretion in enforcement has survived a vagueness challenge. In *Harris v. Mexican Specialty Foods, Inc.*, the Eleventh Circuit held that because the FCRA "clearly defines what conduct is prohibited and the potential range of fine that accompanies noncompliance," a statute that allowed the jury to determine damages between $100 and $1,000 was not unconstitutionally vague. 564 F.3d 1301, 1311-12 (11th Cir. 2009). The result flowed directly from the Supreme Court's conclusion in *Batchelder*: "although violators could not know which statute they would be charged under, and thus what penalty would be imposed," there was no "vagueness in the definition of the prohibited conduct." *Id*. (citing *Batchelder*, 442 U.S. at 115). In *Harris*, "potential defendants [had] notice that if they violate [the statute], they will be subject to penalties of $100 to $1,000 per violation." *Id*. Accordingly, the statute was not unconstitutionally vague. *Id*. To put it even more bluntly: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail." *Blakely v. Washington*, 542 U.S. 296, 309 (2004).

Batchelder, *Blakely*, and *Harris* all make the basic proposition clear: so long as the penalties associated with violation of either the ICRAA or the CCRAA are plainly stated, the void-for-vagueness doctrine offers no refuge for The Screening Pros. Allowing otherwise would threaten judicial invalidation of legislative policy goals in every corner of law where multiple statutes regulate and prohibit similar or identical conduct. Fortunately, the law forbids that result. Two statutes—otherwise promulgated within the constitutional power of the legislature—that clearly prohibit the same conduct are not unconstitutionally vague. If The Screening Pros prefers that its conduct be governed by one or neither of the two statutes, it should make its case to the California legislature and not in the federal courts.

B. California's Credit Reporting Statutes Are Not in Conflict.

The inapplicability of the void-for-vagueness doctrine does not mean that courts cannot or will not evaluate two statutes whose clear terms intersect. While *Batchelder* makes clear that the bar for that evaluation will be high, courts frequently encounter situations where two statutes regulate the same conduct and conflicts between them require resolution. When those conflicts occur, and there is an argument that one statute renders the other unenforceable, the rule is clear: The Supreme Court has "repeatedly stated . . . that absent a clearly established congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (internal citations and quotation marks omitted); *see also Pac. Lumber Co. v. State Water Res. Control Bd.*, 37 Cal. 4th 921, 943 (2006) ("The courts are bound, if possible, to maintain the integrity of both statutes" unless two overlapping statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation."). The Court "has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001) (citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992).

ICRAA and CCRAA regulate some of the same conduct, but their overlapping provisions either prohibit exactly the same conduct or do not conflict at all. And both statutes contain express exclusions, which ensures that they each reach some distinct cases. Cal. Civ. Code. §§ 1785.3(c) (CCRAA) (excluding reports that solely contain character information "obtained through personal interviews); *id.* § 1786.2(c) (ICRAA) (excluding reports that are "limited to specific factual information relating to a consumer's credit record . . . obtained directly from a creditor").

An argument that the ICRAA's amendment in 1998 created an irreconcilable conflict with the CCRAA fails even on its own terms. The district court correctly concluded that the criminal records information The Screening Pros reported to Maple Square subjected The Screening Pros to both the ICRAA and CCRAA. ER 46. The court held that "[i]n general, the ICRAA imposes stricter duties and more severe penalties than the CCRAA, and consumers have different rights under each statute." ER 43. But the court did not establish that the requirements underlying each of Moran's causes of action were so inconsistent with the CCRAA that the two statutes were in "irreconcilable conflict." *Branch*, 538 U.S. at 273. The district court treated the fact of the two statutes' overlap as the end of the analysis; it is, instead, the beginning.

Had the district court undertaken that analysis, the answer would have been clear: Even a superficial look at the relevant provisions of the ICRAA and CCRAA indicate that all but one of the statutory requirements underlying Moran's complaint are identical under the two statutes. And the one difference creates no conflict at all, let alone an irreconcilable one. To take each claim in turn:

- ***Moran's Fourth Claim:*** Both the ICRAA and the CCRAA prohibit the reporting of "[r]ecords of arrest, indictment, information, misdemeanor complaint, or conviction of a crime that, from the date of disposition, release, or parole, antedate the report by more than seven years. These items of information shall no longer be reported if at any time it is learned that, in the case of a conviction, a full pardon has been granted or, in the case of an arrest, information, or misdemeanor complaint, a conviction did not result." Cal Civ. Code §§ 1768.18(a)(7) (ICRAA); 1785.13(a)(6) (CCRAA).

- ***Moran's Fifth Claim:*** Both the ICRAA and the CCRAA require a credit reporting agency to "maintain reasonable procedures designed to avoid violations of Section 1786.18 [Section 1785.13 (CCRAA)]." *Id.* §§ 1786.20(a) (ICRAA); 1785.14(a) (CCRAA). And both require agencies to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *Id.* §§ 1786.20(b) (ICRAA); 1785.14(b) (CCRAA).

- ***Moran's Sixth Claim:*** Both the ICRAA and the CCRAA require reporting agencies to reinvestigate disputes regarding the content of reports. The terms of those requirements are identical in every relevant respect. *Id*. §§ 1786.24 (ICRAA); 1785.16 (CCRAA).

- ***Moran's Seventh Claim:*** Both the ICRAA and the CCRAA require reporting agencies to obtain proper certification. *Id.* §§ 1786.12(e) (ICRAA); 1785.14(a) (CCRAA).

- ***Moran's Eighth Claim:*** Both the ICRAA and the CCRAA require reporting agencies to disclose the source from which the consumer information was obtained. *Id*. §§ 1786.28 (ICRAA); 1785.18 (CCRAA).

As to each of these five claims, the language of the ICRAA and CCRAA are identical. There can be no irreconcilable conflict between identical statutes.

Moran's final ICRAA claim alleges that The Screening Pros violated California Civil Code § 1786.29 by failing to provide the required notices on the first page of the Report. CCRAA does not require such a notice; in this case, ICRAA imposes that additional duty on providers of investigative consumer reports. But the imposition of an additional duty does not make the ICRAA invalid. The rule is the same here as in any scenario where two statutes apply: the statutes must be in "irreconcilable conflict" before courts can deem one of them void by implication. Absent a "demonstration of the impossibility of determining, in each instance, the respective . . . requirements under each Act," then the court must "apply[] the higher requirement as satisfying both." *Powell v. United States Cartridge Co.*, 339 U.S. 497, 518 (1950); *see also Hale v. State of Ariz.*, 993 F.2d 1387, 1405 (9th Cir. 1993) (same). If that application is possible, then the two statutes "are not mutually exclusive," they are "mutually supplementary." *Powell*, 339 U.S. at 519-20.

The ICRAA and the CCRAA are mutually supplementary in exactly this way. For The Screening Pros to sustain an argument that the ninth cause of action is based on a section of the ICRAA that unconstitutionally conflicts with the CCRAA, it must *specifically* identify that provision of the CCRAA that cannot be honored by providing the required notice. That is, the CCRAA must prohibit the inclusion of the ICRAA's mandatory first-page notice. The Screening Pros has not attempted this argument below because it cannot: not only does the CCRAA not prohibit the inclusion of such a notice, but nothing in the CCRAA can be construed to conflict with that requirement.

For these reasons, the ICRAA is not unconstitutionally vague and it does not impliedly repeal the CCRAA (or vice versa). The two statutes are sometimes identical, sometimes complementary, and sometimes supplementary, but never in conflict. The district court's conclusion to the contrary should be reversed.

C. The District Court Was Wrong to Conclude That It Was Bound by a California Court of Appeal's Application of Federal Due Process Principles.

The district court failed to acknowledge or distinguish the cases upholding overlapping statutes in the face of similar vagueness challenges. Instead, the court relied on a single California Court of Appeal decision, *Ortiz v. Lyon Management Group,* which struck down the ICRAA as unconstitutional. 69 Cal. Rptr. 3d 66 (2007). The district court held that it was "bound" to follow *Ortiz* on questions of "applicable state law" in the absence of "convincing evidence that the California Supreme Court would decide otherwise." ER 42 (citing *Munson v. Del Taco, Inc.*, 522 F.3d 997, 1002 (9th Cir. 2008)).

The district court was wrong to rest its decision on *Ortiz* because that decision rested on federal constitutional law. The void-for-vagueness doctrine on which *Ortiz* relied arises from the Due Process Clauses of the U.S. Constitution, made applicable to the states through the Fourteenth Amendment. *See Kolender v. Lawson*, 461 U.S. 352, 353-54 (1983). The California Supreme Court interprets the state's own Due Process Clause as coextensive with the federal constitutional right, applying the same legal test "[u]nder both Constitutions." *People v. Morgan*, 170 P.3d 129, 137 (Cal. 2007) (citing *Williams v. Garcetti*, 853 P.2d 507 (Cal. 1993)).

Thus, while *Ortiz* declared a *state* statute unconstitutional, the court—and the cases it cited—did so based on *federal* constitutional principles. *See People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997) (reviewing the constitutionality of state action and citing roughly eighteen cases in its vagueness analysis, fourteen from the U.S. Supreme Court); *Cranston v. City of Richmond*, 710 P.2d 845, 849-56 (Cal. 1985) (reviewing the constitutionality of a local public employee regulations and citing roughly fourteen cases in describing the vagueness doctrine, nine from the U.S. Supreme Court and one from the U.S. Court of Appeals for the Seventh Circuit).

Indeed, the presumption in these cases is that "there is no independent and adequate state ground for a state court decision when the decision 'fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Coleman v. Thompson*, 501 U.S. 722, 735 (1991) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). "A state court may overcome the above presumption simply by stating 'clearly and expressly that its decision is based on bona fide separate, adequate, and independent grounds.'" *Nitschke v. Belleque*, 680 F.3d 1105, 1109 (9th Cir. 2012) (quoting *Coleman*, 501 U.S. at 733). Neither *Ortiz* nor the district court's decision below identifies anything in California law imposing an independent standard of vagueness under California law.

The district court was thus not bound by *Ortiz*. Its exclusive reliance on that decision in declaring the statute unconstitutional independently requires reversal.

D. This Court Should Reinstate Moran's Claims for Injunctive Relief Under the Unfair Competition Law Based on Investigative Consumer Reporting Agencies Act Violations.

The district court dismissed Moran's final two claims under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*., on two bases: (1) that the FCRA preempted injunctive relief under the Unfair Competition Law when the relief sought is predicated on violations of the FCRA; and (2) that, under the Unfair Competition Law as interpreted by the California Supreme Court, "disgorgement of profits obtained by means of an unfair business practice is not 'an authorized rem under the [Unfair Competition Law] where these profits are neither money taken from a plaintiff nor funds in which the plaintiff has an ownership interest.'" ER 48 (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 941 (Cal. 2003)). Moran does not appeal either conclusion.

But even accepting these conclusions, Moran's claims under the Unfair Competition Law were also independently predicated on The Screening Pros' violations of the ICRAA. The district court presumably failed to address these arguments because it had just concluded that the ICRAA was unconstitutionally vague. If this Court determines that the district court misfired when it applied the void-for-vagueness doctrine, it should as a matter of course reinstate the claims for injunctive relief that are based on The Screening Pros' state-law violations.

II. The Fair Credit Reporting Act Prohibits the Inclusion of a Ten-Year-Old Misdemeanor Charge in a Consumer Report.

A. The Statute's Text Compels Reversal.

The district court's statutory analysis of federal credit-reporting law was as flawed as its constitutional analysis of state credit-reporting law. Here, as in all statutory analysis, "the beginning point must be the language of the statute." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

The FCRA's language, as amended in 1998, leaves no doubt regarding the illegality of The Screening Pros' disclosure of Moran's ten-year-old, subsequently-dismissed misdemeanor charge. Here is the relevant text: "[N]o consumer reporting agency may make any consumer report containing . . . *any other adverse item of information* . . . which antedates the report by more than seven years." 15 U.S.C. § 1681c(a)(5) (emphasis added). The catchall phrase "any other adverse item of information" is meant to have "an expansive meaning." *Dep't of Hous. and Urban Dev.*

v. Rucker, 535 U.S. 125, 131 (2002). If an item of information is adverse to the consumer, and Congress has not qualified that item elsewhere in the statute, the item can only be included in the report if it occurred in the preceding seven years.

In 2000, Moran was charged with a misdemeanor. The Screening Pros has not contended that the disclosure of the charge was not "adverse" to Moran. Nor has it claimed that any of the FCRA's exceptions to the seven-year reporting period are applicable here. And because The Screening Pros issued the report to Maple Square in 2010, it occurred outside the FCRA's seven-year window. That disclosure therefore violated 15 U.S.C. §§ 1681c(a)(5), 1681e(b), and 1681i, as Moran alleged in the first three counts of his complaint. ER 57-59 at ¶¶ 54-70.

If The Screening Pros had issued its report under a prior version of the FCRA, Moran could not have contested the misdemeanor's inclusion. Prior to its amendment in 1998, the FCRA allowed consumer reports to include "[r]ecords of . . . indictment . . . which, from *date of disposition* . . . antedate the report" by seven years or less. 15 U.S.C. § 1681c(a)(5) (1997) (emphasis added). Moran's record of indictment was not disposed until 2004, six years prior to the Report and therefore within the seven-year window.

But in 1998, Congress erased completely the terms "indictment" and "date of disposition" from the FCRA. In their place, all that remains is clear instruction that "other adverse information" cannot be included in a report if that information "antedates the report by more than seven years." 15 U.S.C. § 1681c(a)(5). Because Moran's ten-year-old misdemeanor charge fits that bill, the statutory analysis should end there. The Screening Pros' insistence that Moran's misdemeanor charge must be reported because the "date of disposition" is within the seven-year window seeks the benefit of a statutory provision that no longer exists.

The Screening Pros argued below that "[i]t would be illogical and misleading for [the company] to simply list the dismissal date for criminal charges and omit the nature of the charges and the date they were filed simply because parts of the same proceeding occurred outside the reportable period." ER 17. But the premise of this argument—that reporting the dismissal is permissible—is mistaken. Reporting the dismissal alone necessarily reveals the *existence* of underlying charges and is therefore prohibited. *See Serrano v. Sterling Testing Sys., Inc.*, 557 F. Supp. 2d 688, 692 (E.D. Pa. 2008); *Commentary on the Fair Credit Reporting Act*, 16 C.F.R. Pt. 600, 558, App. § 605(a)-6 (1990) ("A consumer reporting agency may not furnish a consumer report indicating the existence of obsolete adverse information, even if no specific item is reported.").

Nor would the FCRA's prohibition against this kind of disclosure mean, as The Screening Pros argued below, that reporting agencies could not disclose "a recent late payment on a credit card . . . simply because the credit card was opened more than seven years prior." ER 17. The analogy is false: In The Screening Pros' example, the adverse information *is* the second event; opening a credit card is not. Because it is not, the disclosure that the account was opened outside of the seven-year window is not governed by the FCRA.

Because, here, the misdemeanor is the adverse event, it is subject to the FCRA's window. And because it occurred outside that window, The Screening Pros violated the law by including it in the report. If upheld, the district court's decision to the contrary would effectively nullify the 1998 amendment to the FCRA. Because courts must "presume[] that Congress intends its statutory amendments to have real and substantial effect," *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 243 (2004), the district court's decision should be reversed.

B. Agency Guidance Does Not Contradict the Statute's Text.

The Screening Pros' primary argument to the district court on reconsideration was statutory. ER 15-17. But the company also insisted that the Federal Trade Commission's 1990 Commentary—which interpreted the *pre*-amendment FCRA—sheds light on the meaning of the present-day FCRA. ER 17. The district court agreed, and viewed the Commission's 2011 Staff Summary and Commentary as indications that the pre-amendment interpretations of section 1681c(a)(5) applied even after amendment. ER 8. The district court specifically suggested that the 2011 Staff Summary—a document not published in the Federal Register, and one that the Commission identified as lacking the "force or effect of regulations or statutory provisions," 2011 Staff Summary at 17—was "[o]f particular import to this case." ER 8. But the section of the 2011 Staff Summary the district court found persuasive was an endnote referring to the pre-amendment 1990 Commentary the Commission had just rescinded. *See* 2011 Staff Summary at 57 (citing endnote 194); 76 Fed. Reg. at 44,463 (rescinding 1990 Commentary).

The court was wrong to elevate an endnote in the 2011 Staff Summary—an endnote that merely references the pre-amendment Commentary and is not published in the Federal Register—over the current text of the statute. Even without the complicating factors surrounding the Commentary, including the Commission's own caveats, the district court's reliance on it violates one of the central principles of administrative law: "No deference is due to agency interpretations at odds with the plain language of the statute itself." *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989).

In any event, there is no indication that the Commission intended its 1990 interpretation of section 1681c(a) to have any continued bearing on the current FCRA. The Commission called the Commentary "partially obsolete," "stale[]," and "in conflict with the law as it has been amended." 76 Fed. Reg. 44,462, 44,463. When Congress transferred interpretative authority over the FCRA from the Commission to the newly formed Consumer Financial Protection Bureau, the Commission was in the process of bringing the Commentary up to date. Rather than provide a replacement for the out-of-date guidance, it published, outside of the Federal Register, "a compendium of interpretations that it believes will be of use" to the new Bureau's staff. 2011 Staff Summary at 7. The Commission's role as interpreter of the FCRA has now been displaced by the Bureau. It is up to the new agency—and only that agency—to provide authoritative guidance.

CONCLUSION

Because the ICRAA is not unconstitutionally vague, and because the FCRA prohibits disclosure of a ten-year-old misdemeanor charge, the district court's contrary judgments should be reversed and counts one through eleven of the complaint should be reinstated.

Respectfully submitted,

<u>*/s/ Deepak Gupta*</u>

Deepak Gupta
Peter Conti-Brown
GUPTA BECK PLLC
1625 Massachusetts Ave., NW
Washington, DC 20036
202) 470-3826
deepak@guptabeck.com

Meredith Desautels
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA
131 Steuart Street, Suite 400
San Francisco, CA 94105

Joshua E. Kim
A NEW WAY OF LIFE REENTRY PROJECT PROJECT
P.O. Box 875288
Los Angeles, CA 90087

Devin H. Fok
LAW OFFICES OF DEVIN H. FOK
P.O. Box 7165
Alhambra, CA 91802

Craig Davis
LAW OFFICES OF CRAIG DAVIS
524 Union Street, Suite 358
San Francisco, CA 94133

Counsel for Plaintiffs-Appellants

September 27, 2013

STATEMENT OF RELATED CASES

As required by Local Rule 28-2.6, I hereby state that I am aware of no other cases in this Court that are related within the meaning of the rule.

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 8,652 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2013, I filed the forgoing Brief of Appellant with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit using the Court's CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Deepak Gupta
Deepak Gupta