

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

PROPOSED BRIEF FOR *AMICI CURIAE* EAST BAY COMMUNITY LAW CENTER;
ASIAN AMERICANS ADVANCING JUSTICE - ASIAN LAW CAUCUS; AMERICAN
CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA; BAY AREA LEGAL AID;
THE CALIFORNIA REINVESTMENT COALITION; THE CENTER FOR EMPLOYMENT
OPPORTUNITIES; DRUG POLICY ALLIANCE; ELLA BAKER CENTER; THE
UNIVERSITY OF CALIFORNIA HASTINGS CIVIL JUSTICE CLINIC; HOUSING AND
ECONOMIC RIGHTS ADVOCATES; LEGAL ACTION CENTER; LEGAL SERVICES
FOR PRISONERS WITH CHILDREN; THE NATIONAL CONSUMER LAW CENTER;
THE NATIONAL EMPLOYMENT LAW PROJECT; THE NATIONAL HOUSING LAW
PROJECT; PUBLIC GOOD; RUBICON PROGRAMS; AND SAFER FOUNDATION
URGING REVERSAL

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INTRODUCTION

Amici curiae East Bay Community Law Center, Asian Americans Advancing Justice - Asian Law Caucus, American Civil Liberties Union of Southern California, Bay Area Legal Aid, The California Reinvestment Coalition, The Center for Employment Opportunities, Drug Policy Alliance Ella Baker Center, The University of California Hastings Civil Justice Clinic, Housing and Economic Rights Advocates, Legal Action Center, Legal Services for Prisoners with Children, The National Consumer Law Center, The National Employment Law Project, The National Housing Law Project, Public Good, Rubicon Programs, and Safer Foundation submit this brief in support of plaintiff-appellant Gabriel Moran, and in support of the millions of California consumers who will be harmed if the district court's decision in this case stands.

The district court's ruling would nullify essential state and federal consumer protection laws that govern the sale of criminal background-check information to private landlords and employers. For nearly four decades, these complementary laws have improved accuracy and fairness in criminal history reporting, striking a careful balance between protecting consumers' privacy interests and ensuring that landlords and employers receive reliable and relevant information about prospective tenants and employees. By

voiding these protections and the mechanisms to enforce them, the district court's ruling increases the likelihood of inaccurate and overbroad background checks. The result will be reduced opportunities for successful community reintegration for people with criminal records who have served their sentences and transformed their lives. This outcome will harm the consumers who will be unfairly denied jobs and housing, and their communities that will suffer the consequences of underemployment, homelessness, and the resulting decrease in public safety.¹

STATEMENT OF INTEREST²

The East Bay Community Law Center ("EBCLC") is the non-profit poverty law clinic of the UC Berkeley Law School that provides free legal services to thousands of low-income clients each year. EBCLC's Clean Slate Practice serves clients who have criminal records and are now working to

¹ Employment of people with criminal records is proven to reduce recidivism, decrease victimization, and increase public safety. According to a study in Illinois that followed 1,600 individuals recently released from state prison, only 8 percent of those who were employed for a year committed another crime, compared to the state's 54-percent average recidivism rate. Dr. Art Lurigio, Loyola Univ., Presentation at the American Correctional Association's 135th Congress of Correction: Safer Foundation Recidivism Study (August 8, 2005).

² Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

reenter their communities as full and contributing members. The 1,200 clients with criminal records EBCLC's serves each year face daunting barriers to employment and housing, sometimes as the result of decades-old convictions, and often despite their hard-won success in rehabilitation. Almost all of EBCLC's reentry clients have benefited directly from the protections of the ICRAA and the FCRA compromised by the district court's ruling in this case.

The ACLU of Southern California does a variety of work aimed at preventing prior arrests and convictions from interfering with peoples' ability to exercise their rights and reintegrate into their communities.

Asian Americans Advancing Justice - Asian Law Caucus, founded in 1972, is the nation's first legal and civil rights organization serving the low-income Asian Pacific American communities. Advancing Justice - ALC focuses on housing rights, immigration and immigrants' rights, labor and employment issues, student advocacy (ASPIRE), civil rights and hate violence, national security, and criminal justice reform.

Bay Area Legal Aid ("BayLegal") is the largest provider of free civil legal services in the San Francisco Bay Area. BayLegal regularly assists clients who face barriers to employment or housing due to outdated or inaccurate criminal information occurring on tenant and employee background checks. BayLegal thus has a substantial interest in ensuring that

ICRAA is upheld in order to preserve clients' rights to accurate, fair, and rehabilitative reporting of criminal records.

The California Reinvestment Coalition (“CRC”), based in San Francisco, is a nonprofit membership organization of over 300 nonprofit organizations and public agencies across California. CRC works with community-based organizations to promote the economic revitalization of California’s low-income communities and communities of color. CRC promotes increased access to credit for affordable housing and community economic development, and to financial services for these communities.

The Center for Employment Opportunities (“CEO”) is a national organization dedicated to providing immediate, effective and comprehensive employment services to men and women with recent criminal convictions. CEO’s vision is that anyone with a recent criminal history who wants to work receives the preparation and support needed to find a job and to stay connected to the labor force.

The Drug Policy Alliance (“DPA”) is the nation's leading organization promoting drug policies that are grounded in science, compassion, health and human rights. DPA works to reduce the harms caused by our nation’s drug policies, including removing collateral consequences that follow a drug conviction -- such as barriers to

employment, housing, and educational opportunities -- that impede a person's ability to successfully reintegrate into society.

The Ella Baker Center is named for an unsung hero of the civil rights movement who inspired and guided emerging leaders. The Ella Baker Center's work aims to defend and advance the right to safety, to dignity, to equality, and to self-determination. Ella Baker Center focuses on addressing the huge crisis in our justice system, the source of which is the expensive and failed War on Drugs which saps states of their resources and has been proven time and again to have a disproportionate impact on communities of color.

The University of California Hastings Civil Justice Clinic ("CJC") is the main clinical teaching program at the University of California Hastings College of the Law. The CJC provides free and direct legal services to low-income, Bay Area clients, who include many people with criminal records. The consumer protections at issue in this appeal are critical to our clients' ability to secure stable housing and employment post-conviction and to overcome the substantial barriers to reentry.

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

work includes providing direct legal services on all forms of credit reporting problems.

Legal Action Center (“LAC”) is a national public interest law firm founded in 1972, that performs legal and policy work to fight discrimination against and promote the privacy rights of individuals with criminal records, alcohol/drug histories, and/or HIV/AIDS. Our National H.I.R.E. (Helping Individuals with criminal records Reenter through Employment) Network works with policy makers and advocates nationwide to promote employment and other opportunities for individuals with criminal records. With respect to commercial background checks, we work to ensure compliance with the fair credit reporting laws at both the federal and state level and to promote best practices. The questions posed on appeal are of vital concern to LAC’s constituency across the country, who are trying to better their lives despite past involvement with the criminal justice system.

Legal Services for Prisoners with Children (“LSPC”) organizes communities impacted by the criminal justice system and advocates to release incarcerated people, to restore human and civil rights, and to reunify families and communities. Ending discrimination based on criminal background against people who are reentering society after prison is a core part of LSPC's basic organizational mission.

The National Consumer Law Center (“NCLC”) is a nonprofit organization and possesses a unique expertise and interest because of its many years of work on protecting the integrity of the Fair Credit Reporting Act rights of low-income consumers. NCLC conducted an extensive analysis of the background screening industry and documented common mistakes and poor practices.

The National Employment Law Project (“NELP”) is a leader in the movement to restore fairness to the process of criminal background checks and remove unnecessary or badly-designed barriers to the employment of people with criminal records. NELP promotes model employment policies and basic protections that allow qualified workers with records to attain and retain quality jobs.

The 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.

Public Good is a public interest organization dedicated to the proposition that all are equal before the law. Through amicus 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 FCRA represent a careful legislative balance between the need for information by users of credit reports and the need for privacy and for a clean slate by those who have incurred, and paid, a debt to society. These statutes may not lightly be set aside.

Rubicon Programs provides employment, supportive services, and legal services to people re-entering the community following incarceration throughout the San Francisco East Bay area. Our clients with criminal records depend greatly on the protections afforded by the ICRAA when trying to enter the workforce; without them, our clients will have even greater difficulty supporting themselves, their families, and making positive contributions to their community.

Safer Foundation's overarching goal for its policy and advocacy work is the elimination of administrative and legislative barriers to employment for people with criminal records. Safer's policy and advocacy strategies are driven by its organizational mission to reduce recidivism.

BACKGROUND

In 2012, Mr. Moran applied for low-income housing and his prospective landlord paid The Screening Pros to conduct a background

check. *Moran v. The Screening Pros, LLC*, Case No. 2:12-CV-05808-SVW-AGR, 2012 U.S. Dist. LEXIS 158598 at *2 (C.D. Cal. Sept. 28, 2012) (hereafter “Order”). The background check included two entries in violation of California’s Investigative Consumer Reporting Agencies Act (ICRAA): Two dismissed counts relating to a 2006 conviction and a 2000 arrest that did not lead to conviction. *Id.* at *3; *see* Cal. Civ. Code § 1786.18(a)(7) . Mr. Moran contested the information in the report, but The Screening Pros failed to respond to his consumer dispute. Order at *3. Mr. Moran then filed this lawsuit, alleging violations of both the ICRAA and its federal analog, the Fair Credit Reporting Act (FCRA). *See id.* at *3-4.

After confirming that the reporting of criminal record information “clearly subjects” a report to the ICRAA, the district court held that “the ICRAA is unconstitutionally vague because it failed to provide adequate notice to Defendant as to whether the statute covered its report containing criminal information.”³ *Id.* at *21, 23. This conclusion was based not on

³ The district court cited *Ortiz v. Lyon Management Group, Inc.*, 69 Cal. Rptr. 3d 66, 75 (Ct. App. 2007), which found the ICRAA unconstitutionally vague as to reports containing unlawful detainer information because “[r]easonable persons cannot readily determine whether unlawful detainer information constitutes ‘character’ information governed by the ICRAA or ‘creditworthiness’ information governed by the CCRAA.” 69 Cal. Rptr. 3d 66, 68 (2007). *Ortiz* is due no deference because it incorrectly assumed that these two non-conflicting statutes could not both apply when, in fact, both the ICRAA and the CCRAA explicitly regulate the reporting of unlawful detainer information. Cal. Civ. Code § 1786.18; § 1785.13 (CCRAA). The court failed to examine whether these two partially

any claimed vagueness in the ICRAA’s language, but on the fact that the same conduct prohibited by the ICRAA—including the reporting of arrests not leading to a conviction and convictions older than seven years—was *also* prohibited by another state statute, the Consumer Credit Reporting Agencies Act (“CCRAA”). *Id.* at *21-22. The district court’s holding ignores well-established case law that holds that there is no unconstitutional vagueness simply because the same conduct is prohibited by more than one statute. *United States v. Batchelder*, 442 U.S. 114, 123 (1978). *See also Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1312 (11th Cir. 2009)(holding that a consumer protection statute was not vague despite discretion in enforcement because the prohibited conduct was clearly defined.)

If allowed to stand, *Moran*’s nullification of the ICRAA and key protections under the FCRA will have grave consequences for consumers and for the landlords and employers who purchase the reports governed by these laws.

ARGUMENT

I. FAIR AND ACCURATE REPORTING OF CRIMINAL RECORD INFORMATION IS ESSENTIAL TO PROTECTING INDIVIDUALS’ RIGHTS AND OPPORTUNITIES.

overlapping statutes conflict. They do not, thus both statutes may both be given effect.

The reach of the criminal justice system has grown dramatically in recent decades, and the United States now has the highest incarceration rate in the world. Approximately one in four adults has a criminal record.⁴ The consequences of involvement in the criminal justice system are more serious and enduring than ever before. People face formidable barriers to achieving economic and social stability because of their criminal records, even those that are *de minimis* or decades old.

These barriers are exacerbated—often unfairly—by the commercial background-check industry’s widespread dissemination of criminal record information to employers and landlords. Ninety-two percent of employers and eighty percent of large property companies run background checks on prospective employees and tenants.⁵ National Consumer Law

Center, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* 20 (2012), available

⁴ 65 million Americans have a criminal record. Michelle Natividad Rodriguez & Maurice Ensellom, The National Employment Law Project, *65 Million “Need Not Apply”*: The Case for Reforming Criminal Background Checks for Employment 1 (2011), available at http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf. This increase is a result of unduly punitive drug laws. See generally Drug Policy Alliance, *Drug War Statistics*, <http://www.drugpolicy.org/drug-war-statistics> (last visited Oct. 1, 2013).

⁵ The background-check industry takes in \$1.5 billion in revenue annually. IBISWorld, Inc., *Background Check Services in the US* (2013) 11-12, available at http://clients1.ibisworld.com/reports/us/industry/currentperformance.aspx?e_ntid=6058 (last visited Oct. 4, 2013).

at <http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf> (last accessed on October 4, 2013); *see generally* Harry J. Holzer, et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & Econ. 451, 453-54 (2006).

A. Background Checks Contain a High Rate of Errors with Deleterious Impact on Consumers.

Amici's clients are routinely denied jobs and housing on the basis of criminal history reports that contain errors and/or violations. These errors are, in part, the result of the breathtaking scope of the background-check industry at every level. There are dozens of large corporations and hundreds—perhaps thousands, of smaller ones—that disseminate millions of criminal records compiled from a range of local, state, and federal sources. SEARCH, The National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information 22-28, *available at* www.search.org/files/pdf/RNTFCSCJRI.pdf.)

Beyond the risks raised by the sheer of volume of the information and players involved in the industry,⁶ the manner in which many companies in the prepare criminal history reports increases the risk of inaccuracies. For

⁶ One background-check company, for example, advertises access to its database of more than 430 million criminal records and more than 11 million photos. Backgroundchecks.com About Us, www.backgroundchecks.com/info.mvc/about-us (last visited October 3, 2013).

example, many background-check companies purchase bulk criminal record information from courts in a static format such as microfiche, or access databases of information that are not updated. Scores of online background-check companies that now sell instantaneous criminal history reports provide consumer information that is not current. When background-check preparers rely on these records without further corroboration, the criminal history reports they sell fail to disclose subsequent, often mitigating, court activity in a case. In California, the information missing from criminal history reports that are not current include dismissals, set-asides, successful completion of diversion programs, orders for record sealing, expungements, felony reductions to misdemeanors, misdemeanor reductions to infractions, and Certificates of Rehabilitation.

Background-check companies are bound to follow “reasonable” procedures to ensure “maximum possible accuracy.” 15 U.S.C. § 1681e. Nonetheless, *amici*’s clients are too often subjects of criminal history reports prepared by noncompliant companies that are either unaware of—or unconcerned with—consumer protection laws. Even companies that claim to follow good practices disclose erroneous information. The resulting reports include inaccurate, incomplete, or misleading criminal-record information, and do not give proper notice to the consumer. NCLC, *supra*, at 7-8. These errors include, among others:

- reporting the wrong person's criminal record;
- misclassification of the severity of an offense (reporting misdemeanors as felonies and infractions as misdemeanors);
- omission of court action subsequent to arrest or conviction;
- erroneously reporting the date of an expungement as the date of conviction, which misleads the employer or landlord to believe the offense is more recent than it actually is;
- reporting a single incident with multiple charges as separate incidents; and
- failing to provide a code section and instead listing an incorrect offense title.⁷

The errors in background-checks are compounded when back-ground check companies fail to comply with the notice provisions of the consumer protection laws. Federal and California law mandate that the subject of a criminal history report receive a copy of the report, both when the subject requests it (under the ICRAA) and five days before the employer takes adverse action (under the FCRA). *See* Cal. Civil Code § 1786.16(b)(1); 15 U.S.C. § 1681b(b)(3). In theory, these notice provisions give consumers the opportunity to inspect the report and correct inaccuracies. Unfortunately, in

⁷One EBCLC client was recently denied a job after a criminal history report erroneously listed her misdemeanor conviction for possessing unlabeled DVDs as an assault with a deadly weapon.

the experience of the clients who *amici* serve, background check companies frequently ignore these requirements. Subjects of criminal history reports may only discover and address errors and violations after—and only *if*—they receive the report from a prospective employer or landlord. There are thousands of background-check companies that sell criminal history reports and consumers often do not get advance notice of which one will prepare their report. This makes it is nearly impossible for consumers to preemptively review and correct errors or violations contained in a report before it is disseminated to employers and landlords.

Consequently, any necessary corrections to errors, if the background-check company makes them at all, usually come too late when the damage is done: The consumers have lost the jobs or housing opportunities, and suffered irreparable damage to their reputations.

The experience of one EBCLC client illustrates many the most pervasive problems. John Doe was offered a job at a national retailer in California, but the offer was rescinded after a background-check company sold the employer a criminal history report containing the following errors about Mr. Doe’s history: the report (1) reported his conviction as a felony when it was in fact a misdemeanor; (2) called the offense a “felony abduction” when in fact the offense related to a violation of a court order; (3) failed to disclose that the conviction had been set aside following a

showing of rehabilitation pursuant to California Penal Code section 1203.4; (4) falsely indicated that Mr. Doe was still on probation; (5) and listed an incorrect—and more recent—date of disposition. Notably, Mr. Doe’s and his attorney’s efforts to get the report corrected, required, among other measures, more than 25 telephone calls to the background-check company before it agreed to fix the errors. By that point, the employer had hired somebody else.

B. Overbroad Criminal Background Checks, Even When Accurate, Impede Fair and Hiring and Tenancy Decisions.

The consumer-protection provisions threatened by the district court’s ruling have been effective tools in preventing the furnishing of overbroad criminal history reports to employers and landlords. The information disseminated in overbroad criminal history reports, even when technically accurate, leads employers and landlords to make misguided hiring and tenancy decisions.

i. Overbroad criminal history reports are unnecessary and limit employers’ and landlords’ pool of qualified employees and tenants.

The ICRAA could limit the disclosure of overbroad criminal history reporting, such as convictions older than seven years and arrests not leading to conviction, without compromising protecting public safety because it

works in concert with California's very strong mechanism of screening of applicants working in sensitive jobs.⁸

Sixty percent of employers admit that they would not or probably would not hire a person with a criminal record. *See* Harry J. Holtzer, Steven Raphael, and Michael A. Stoll, *How willing are employers to hire ex-offenders?*, *Focus*, Vol. 23, No.2, Summer 2004, *available at* <http://www.irp.wisc.edu/publications/focus/pdfs/foc232h.pdf>. Underlying

⁸ A justification for allowing the FCRA to permit the commercial background check industry to disclose *all* criminal convictions, even stale ones, in criminal history reports was to provide for heightened screening of applicants applying for sensitive jobs. §1681c(a)(5). Congress' permitted such broad disclosure of conviction history was to allow employers to consider an applicant's full criminal history when the job at issue involves work in sensitive positions, such as teachers and providers of child and elder care. *See* 144 Cong. Rec. S11638, S11639 (daily ed. Oct. 6, 1998) (statement of Sen. Nickles); 144 Cong. Rec. H10218, H10219 (daily ed. Oct. 8, 1998) (statement of Rep. Leach). While FCRA's permissive disclosure rule in reporting convictions may serve a purpose in other states, it is unnecessary in California, which has its own far stricter criminal background check procedures administered by law enforcement—not private background check companies—for all applicants applying to work with vulnerable populations or in sensitive positions, including those contemplated by the FCRA. Specifically, all California applicants for professional licenses, jobs in licensed facilities or programs, jobs in law enforcement and many government and health care posts, are subject to the LiveScan process, a criminal background check conducted by the California Department of Justice (DOJ). For maximum accuracy, these applicants must submit fingerprints to the DOJ, which then disseminates the applicant's *complete* conviction history to the employer or licensing agency. Cal. Pen. C. § 11105(b). This government screening process is required for a full thirty percent OF jobs in California, which far surpasses the FCRA's protections. Similarly, California employers in banks and other financial institutions governed by the FDIC receive more complete criminal record information about job applicants.

this unwillingness to hire people with records is the fact that employers significantly overestimate both the reliability of a criminal record as a predictor for risk.⁹ This practice runs counter to both employers' and applicants' interests. Blanket exclusion of people with criminal records from employment and housing is not correlated with reducing risk, and thus needlessly limits an employer's or landlord's pool of qualified candidates. Blanket exclusion also increases legal liability because in some cases the practice amounts to illegal race discrimination.¹⁰ Without the protections of the ICRAA, it is more likely that criminal history reports will be overbroad.

Beyond fueling blanket exclusion practices, overbroad background checks can mislead the report's purchaser. Overbroad reports provide criminal record information in a format that is often difficult to decipher and without the context necessary to permit employers and landlords to use the

⁹ Employers also overestimate the risk of their liability for negligent hiring. April Frazier, *Negligent Hiring: Myth or Reality for Employers*, National H.I.R.E. Network, New York, New York, 2008, available at http://www.eastcounty1stop.org/docs/neg_hiring_1_30_08.pdf (finding that only ten percent of negligent hiring claims filed in 2003 involved the hiring of persons with criminal histories and only fifty percent of those claims received favorable decisions).

¹⁰ Because African Americans and Latinos are arrested and convicted at higher rates than other racial groups, a blanket ban against hiring people with records may have a disparate impact that amounts to illegal race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq. See also Equal Employment Opportunity Commission (EEOC), *Enforcement Guidance*, 915.002 16 (2012), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

information to fairly measure an individual applicant's risk of posing a safety or security risk. NELP, *supra*, at 9.

A criminal history report is overbroad if it contains information about an arrest or detention that did not lead to conviction, a successfully completed diversion program, a stale conviction, or a conviction that was judicially set aside, dismissed, or expunged on a finding of rehabilitation. EEOC, *supra*, at 12-13. The reporting of, and the resulting undue weight given to, stale convictions and arrests not leading to conviction are particularly pernicious. Criminal history reports that contain older convictions are an unreliable tool for assessing an applicant's employability because within a relatively short period of time, a criminal conviction ceases to be a reliable predictor of future criminality.¹¹ It is only a few years before an individual's "criminal record empirically may be shown to be irrelevant as a factor in a hiring decision." Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, 263 Natl. Inst. of Just. J. 10, 14-15 (2009).

¹¹ A person who committed an offense six or seven years ago is no more likely to re-offend than someone who has never committed an offense. See Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 3, 483-504 (2006); *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 CRIME & DELINQ., 64-83 (2007).

Similarly, the reporting of and resulting reliance on an applicant's arrest or detention not leading to conviction is often both unfair and a poor way to measure the risk of an applicant. Many arrests do not lead to conviction.¹² These unlitigated events are, by definition, instances when the government never proved—and in many instances did not even file—a case against the arrestee. In many instances, an arrestee may be factually or actually innocent of the offense in question, or may be a victim of identity theft who is arrested for another person's crime. The background-check industry's reporting of arrests, and employers' and landlords' reliance on them for hiring and tenancy decisions, contravenes a cornerstone of our criminal justice system: The presumption that people are innocent until proven guilty. *Coffin v. U.S.*, 156 U.S. 432 (1895).

Overbroad reporting of criminal records also has a disparate impact on people of color, who are significantly overrepresented in the criminal justice system. Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 *Stan. L. Rev.* 1271, 1274 (2004). Compounding the injustices of their overrepresentation in the criminal justice system, African Americans and Latinos with criminal

¹² One-third of felony arrests never lead to conviction. See Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2004*, last revised Apr. 25, 2008, available at <http://www.bjs.gov/content/pub/html/fdluc/2004/fdluc04st.pdf>.

records experience significantly more difficulty securing employment than whites with criminal records.¹³

i. Criminal history reports that are overbroad and inaccurate implicate grave privacy concerns.

The district court's ruling in this case poses a significant threat to consumers' privacy. Consumer protections that govern criminal history reporting exist to strike a fair balance of the competing interests at stake. See S. Rep. No. 91-517, at 2 (1969); S. Judiciary Comm., A.B. 2868-Bill Analysis, 2001-2002 Leg., Reg. Sess. (Cal. Aug. 6, 2002). Employers and landlords reasonably seek reliable information to make informed hiring and tenancy decision, and the businesses in the billion background-check industry have a financial interest in selling criminal history reports. Those interests must be balanced against other interests, including consumer's public safety and consumer's privacy. Cal. Civ. Code § 1786(b) (finding "a need to insure that investigative consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy").

Inaccuracies in criminal record reporting result in grave economic and reputational damage to subjects of inaccurate reports.¹⁴ The privacy harms

¹³ Having a record reduces job interview callback rates generally but blacks with or without a criminal record are less likely to receive a callback for interviews than whites with a criminal record. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 957-59 (2003).

resulting from the erroneous dissemination of criminal history information by background-check companies is particularly problematic when it implicates people who have committed no offense, such as victims of identity theft or someone who shares a common name with someone who does have a criminal record. NCLC, *supra*, at 15.

The ICRAA and the FCRA provisions now at risk were designed to strike a fair balance of the competing interests. With the ICRAA, the California legislature intended to “. . . regulate investigative consumer reporting agencies pursuant to this title in a manner which will best protect the interests of the people of the State of California.” Cal. Civ. Code § 1786 (g).

Until *Moran*, the protections and enforcement mechanisms of the FRCA and the ICRAA have helped achieve a fair balance by increasing the accuracy, reliability, and relevance of criminal history reports. The district court’s ruling upends that balance, and results in under-regulation of criminal history reporting will harm consumers.

¹⁴ The public’s concerns about the privacy of criminal records information is reflected in a survey that found that most adults (ninety percent) and eighty percent of young adults say that they “prefer that State agencies not use the Internet to post criminal history information that is already a matter of public record.” U.S. Bureau of Justice Statistics, *Privacy, Technology, and Criminal Justice Information: Public Attitudes Toward Uses of Criminal History Information* 45 (July 2001).

II. The ICRAA and the FCRA Together Provide A Meaningful Mechanism To Improve Accuracy In Reporting.

The FCRA and the ICRAA work in complement to create a balanced system that provides protection both to the subjects and the users of criminal history reports. But for Californians, the ICRAA's damages provisions have been the most effective tool to redress errors and improve industry reporting practices.

The ICRAA's damages provisions encourage background-check companies to improve their reporting procedures. More than once, and in no small part due to the financial penalties for non-compliance, *amici* have convinced background-check companies to change their company's reporting policies across the board (1) to comply with notice requirements, (2) to cease reporting convictions older than seven years, and (3) to stop reporting arrests not leading to a conviction as required by law. Cal. Civil Code § 1786.29. Thus, the ICRAA has functioned as a vehicle to improve reporting practices not only for the clients *amici* represent, but for all subjects of criminal history reports sold by these background-check companies.

The district court's nullification of the ICRAA and some provisions of the FCRA would significantly dilute a consumer protection scheme that increases the fair and accurate reporting of criminal record information. The

court has shifted the burdens, financial and otherwise, of background-check errors from the industry that is in control of consumers' personal information to the consumers themselves. Most of the clients *amici* serve are job or housing applicants who lack employment, stable housing, or both. They are usually unaware of their consumer rights under state or federal law, and in any case too often lack the resources to enforce them. The background-check industry, which is better situated in terms of informational and financial resources to accomplish the task, can much more easily bear the costs of correcting their own errors on the reports they sell.

Enforcement mechanisms like the ones in the ICRAA are especially important in the background-check context. The background-check industry is not necessarily constrained by a concern for consumers' goodwill, as in other business contexts. Unlike most businesses that serve consumers who are also their customers, the background-check industry's customers are not the only consumers whose rights need protecting. This reality mandates strong consumer protections—like the ICRAA—that include enforceable incentives to protect privacy and ensure accuracy.

CONCLUSION

The Court should reverse the district court's decision. Its misguided nullification of the ICRAA and key provisions of the FCRA will harm consumers around the country, including both those who have criminal

records and those who have criminal records erroneously associated with their names. Without these important and effective protections and enforcement provisions, a large and growing number of consumers run the unreasonably high risk of inaccurate and overbroad reporting of their criminal records. They face employment and housing denials based on convictions that may be decades-old or arrests for offenses they did not commit.

For decades, these protections have accomplished a fair balance of the competing interests at stake: The financial interests of the background-check industry that sells these reports, the need of their purchasers for accurate and reliable information for employment and tenancy decisions, and the privacy and economic concerns of the consumers whose information is reported. The protections have increased appropriate employment opportunities for people with records who are able and eager to work. The resulting benefit to taxpayers has been reduction in recidivism and strengthening communities.

Overwhelmingly, the reentry clients who *amici* serve have worked hard to transform their lives and to make amends for their past mistakes. They demonstrate that when people with records are permitted to work, they are able to support themselves and their families, which is the foundation of public safety and human dignity.

Respectfully submitted,

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October 4, 2013

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6590 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I hereby certify that, on October 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that all other participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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