No. 12-956

In The Supreme Court of the United States

LES JANKEY,

Petitioner,

v.

SONG KOO LEE, individually and dba K&D Market,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In his underlying lawsuit, plaintiff and petitioner Les Jankey (Jankey), a wheelchair user, asserted claims against defendant and respondent Song Koo Lee (Lee), the owner of a small grocery store in San Francisco's Mission District. Pet. App. 11a. Jankey's claims centered on a raised step located at the entryway of Lee's market, which he asserted was an architectural barrier that prevented him and other wheelchair-bound individuals from wheeling directly into the store. *Id.* Jankey's complaint sought to compel Lee to remove the front step barrier, as well as recover monetary damages. Pet. App. 12a. His complaint invoked an array of statutes, including the Americans with Disabilities Act (ADA), sections 54, 54.1, 54.3 and 55 of the California Disabled Persons Act (CDPA), sections 51 and 52 of the Unruh Civil Rights Act, and section 19955 of the California Health and Safety Code.

The trial court granted Lee's motion for summary judgment on all of Jankey's claims. *Id.* Thereafter, as the prevailing party, Lee moved to recover his attorney fees pursuant to section 55 of the CDPA (section 55). *Id.* The parties briefed the applicable issues, including (1) whether the trial court should apply the Ninth Circuit's decision in *Hubbard v. SoBreck, LLC*, 531 F.3d 983 (9th Cir. 2008), *amended and superseded by Hubbard v. SoBreck, LLC*, 554 F.3d 742 (9th Cir. 2009), which held that a prevailing defendant seeking an award of attorney fees under section 55 of the CDPA must show that the plaintiff's claims are

frivolous; (2) whether the court should apply the Court of Appeal's decision in *Molski v. Arciero Wine Group,* 164 Cal. App. 4th 786 (2008), which held that a prevailing defendant seeking attorney fees under section 55 is not required to first show that the plaintiff's claims are frivolous; and (3) whether Jankey's claims were frivolous under the circumstances. Pet. App. 12a-13a.

The trial court concluded that the *Molski* decision was controlling authority and determined that Lee, having prevailed on all of Jankey's claims in the underlying summary judgment motion, was entitled to an award of his reasonable attorney fees and costs. Pet. App. 13a. The trial court awarded Lee attorney fees in the amount of $118,458.00 and costs in the amount of $3,544.54 for a total award against Jankey in the amount of $122,002.54. *Id.* Jankey appealed the court's order awarding attorney fees, but did not appeal the order granting summary judgment. *Id.*

On appeal, the California Court of Appeal affirmed the trial court's award of attorney fees, explaining that it "respectfully disagree[d] with the *Hubbard* court's preemption analysis," and concluded that a mandatory fee award was both required by state law and permitted by federal law. *Id.* Jankey then petitioned for review before the California Supreme Court. *Id.*

The California Supreme Court granted review and affirmed the Court of Appeal's decision, holding neither the construction clause in the ADA[1] nor principles of conflict preemption barred a defendant from obtaining attorney fees under section 55. *Id.*; Pet. App. 27a-28a, 31a-36a. The California Supreme Court explained that "the [construction] clause [in the ADA] disavows any broad preemptive intent, instead permitting states to enact and enforce complementary laws." Pet. App. 23a. "On its face, [the] clause distinguishes state laws that afford equal or better protection to the disabled than the ADA from those that do not." *Id.* "Laws in the former category are shielded from preemption." *Id.* "Laws in the latter category are, by negative implication, not shielded from preemption." Pet. App. 23a-24a.

The court then addressed how to determine whether a state law provides equal or greater protection under the ADA. Pet. App. 25a. Relying on legislative history, the court concluded Congress intended to "preserve for the several states the ability to provide those with disabilities additional remedial options, even options that might in some respects be less inclusive than federal law or offer lesser relief, if

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[1] The construction clause in the ADA provides: "Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act." 42 U.S.C. § 12201(b) (2006) [hereinafter construction clause].

another feature of the state avenue for redress might render it more desirable or beneficial." Pet. App. 26a. "Essentially, Congress embraced a cafeteria approach in which those with disabilities, rather than being restricted to a single federal remedy, could pick and choose from among federal and state remedies and procedures the avenues for relief they thought most advantageous." Pet. App. 26a-27a. The court concluded that if "a state remedial scheme is *in any regard* superior to the ADA, courts should conclude it is not preempted and instead allow plaintiffs the choice whether to seek relief under federal law, state law, or both." Pet. App. 27a (emphasis added).

Applying these principles, the California Supreme Court determined that because section 55 of the CDPA affords greater protection than the ADA in some respects, it was shielded from preemption. "Most notably, section 55's standing provision is broader than its federal counterpart." *Id.* "Under state law, because a plaintiff need only show he or she is 'aggrieved or potentially aggrieved' (§ 55) to seek injunctive relief, 'virtually any disabled person can bring an action to compel compliance with' state disability access guarantees." *Id.* "In contrast, the ADA requires proof of ongoing disability discrimination or reasonable grounds to believe the plaintiff is 'about to be subjected to' such discrimination. A personal stake is essential; '[t]he ADA does not permit private plaintiffs to bring claims as private attorneys general to vindicate other people's injuries.'" *Id.* (citation omitted). The court also observed that

section 55 enforces a broad range of state access requirements above and beyond those contained in the ADA and its enabling regulations. Pet. App. 28a n.13.

The court rejected the Ninth Circuit's conclusion in *Hubbard* that conflict preemption applies to bar the application of section 55's attorney fee provision when an ADA claim is also pled in the action, and the two claims overlap. Pet. App. 31a. The court explained, "Lee would have been entitled to the same fees whether or not Jankey pleaded an ADA claim; the pleading of an ADA claim was neither a necessary nor a sufficient cause of the fee award." *Id.* The fee award was "a consequence of Jankey's *purely voluntary decision* to seek additional state remedies." *Id.* (emphasis added).

The California Supreme Court also rejected the argument that mandatory fee awards to prevailing defendants under section 55 stand as an obstacle to the purposes and objectives of Congress in enacting the ADA, explaining that the fee-shifting policies in the ADA do not apply where "a plaintiff voluntarily invokes a state law remedy that overlaps with the ADA." Pet. App. 35a.

SUMMARY OF THE ARGUMENT

In his Petition for Writ of Certiorari, Jankey focuses almost entirely on why the California Supreme Court's decision is wrong, and why the Ninth

Circuit's decision in *Hubbard* is right. However, he fails to explain why the alleged conflict between California and Ninth Circuit law raises an issue sufficiently important to warrant review by this Court. As explained below, any conflict between *Jankey* and *Hubbard* is inconsequential, and accordingly, this Court should deny the petition for writ of certiorari.

First, this case does not raise an important issue of law because a disabled plaintiff can easily avoid the mandatory attorney fee provision in section 55. A plaintiff is the master of his own complaint. If a disabled plaintiff wishes to avoid the fee-shifting provision in section 55, he or she can simply file a complaint in federal court, or omit the section 55 claim from the complaint completely.

Second, the only conflict Jankey has identified is between the California Supreme Court and the Ninth Circuit. Accordingly, resolution of the issue presented in Jankey's petition would not have a widespread impact. Given that the *Hubbard* decision included only a cursory discussion of the preemption issue and did not address the ADA's construction clause at all, this Court should allow time for the issue to percolate, in order to see whether the conflict will resolve itself.

Third, this Court should deny Jankey's petition because the California Supreme Court's decision was correct. Under the construction clause in the ADA, section 55 is insulated from preemption because it

provides disabled plaintiffs with greater remedies than those afforded under the ADA. Moreover, conflict and obstacle preemption do not apply because a disabled plaintiff's decision to include a section 55 claim is purely *voluntary*, and therefore the availability of this additional remedy does not create a conflict or dissuade plaintiffs from seeking relief under the ADA.

REASONS FOR DENYING THE PETITION

I. Any conflict between California and Ninth Circuit law does not raise issues sufficiently important to warrant review because disabled plaintiffs can easily plead around the mandatory fee provision in section 55.

A. Disability access remedies under federal and California law.

Congress and the California Legislature have afforded persons with disabilities a range of legal tools to address denials of access. The ADA and numerous California statutes each prohibit access discrimination on the basis of disability, but vary in the remedies they provide.

Federal remedies.

The ADA prohibits discrimination on the basis of disability in the enjoyment of public accommodations, including with respect to access. 42 U.S.C. § 12182

(2006). Businesses must "remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable." *Id.* § 12182(b)(2)(A)(iv). Liability does not depend on proof of intentional discrimination, but a private litigant cannot obtain damages for denial of access; only injunctive relief is available. *Lentini v. Cal. Ctr. for the Arts, Escondido,* 370 F.3d 837, 846 (9th Cir. 2004) ("a plaintiff need not show intentional discrimination in order to make out a violation of the ADA"); 42 U.S.C. § 12188(a) (2006).

Under the ADA, attorney fees are discretionary, even as to prevailing plaintiffs. *See* 42 U.S.C. § 12205 (2006). Ordinarily, prevailing plaintiffs receive attorney fees unless such an award would be unjust. *Christianberg Garment Co. v. Equal Emp't Opportunity Comm'n,* 434 U.S. 412, 416-17, 422 (1978). By contrast, the ADA allows defendants to recover attorney fees only if a plaintiff's claims are "frivolous, unreasonable, or groundless." *Id.*; *Summers v. A. Teichert & Son, Inc.,* 127 F.3d 1150, 1154 (9th Cir. 1997); *see* 42 U.S.C. § 12205.

State law remedies.

The principal sources of California disability access protection are the Unruh Civil Rights Act (Cal. Civ. Code § 51 (West 2012)) and the California Disabled Persons Act (CDPA) (Cal. Civ. Code §§ 54-55.3 (West 2012)).

The Unruh Civil Rights Act broadly outlaws arbitrary discrimination in public accommodations,

including discrimination on the basis of disability. Cal. Civ. Code § 51(b) (West 2012). The Unruh Civil Rights Act incorporates by reference the ADA, making violations of the ADA per se violations of the Unruh Civil Rights Act. *Id.* § 51(f) (West 2012); *Munson v. Del Taco, Inc.,* 46 Cal. 4th 661, 668-69 (2009). A plaintiff's remedies under the Unruh Civil Rights Act include injunctive relief, actual damages (in some cases, as much as "three times the amount of actual damages"), and a minimum statutory award of $4,000 per violation. Cal. Civ. Code § 52(a), (c)(3) (West 2012); *Turner v. Assoc. of Am. Med. Colls.*, 193 Cal. App. 4th 1047, 1058 (2011). Under the Unruh Civil Rights Act, only a prevailing plaintiff may recover attorney fees. Cal. Civ. Code § 52.1(h) (West 2012).

The CDPA substantially overlaps with the Unruh Civil Rights Act, also incorporating ADA violations as a basis for relief under the CDPA. Cal. Civ. Code §§ 54(c), 54.1(d) (West 2012); *Munson*, 46 Cal. 4th at 674-75; *Wilson v. Murillo,* 163 Cal. App. 4th 1124, 1131 (2008). Narrower in focus than the Unruh Civil Rights Act, the CDPA generally guarantees people with disabilities equal rights of access "to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation." *Munson*, 46 Cal. 4th at 674 n.8; *see* Cal. Civ. Code §§ 54(a), 54.1(a)(1) (West 2012). The available remedies include actual damages (again, in some cases, as much as "three times the amount of actual damages"), with a $1,000 minimum recovery. Cal. Civ. Code § 54.3(a) (West 2012); *Molski,* 164 Cal.

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App. 4th at 792. A prevailing plaintiff under sections 54 or 54.1 of the CDPA is entitled to attorney fees "as may be determined by the court." Cal. Civ. Code § 54.3(a).

Section 55, though part of the CDPA, offers an independent basis for relief. *Molski*, 164 Cal. App. 4th at 792. It is broader than the private right of action authorized by section 54.3 in two respects: (1) section 55 extends standing to those "potentially aggrieved," not just those who have been actually denied access, and (2) relief may be predicated on potential violations not only of sections 54 and 54.1 but also of various provisions in both the California Government Code and the California Health and Safety Code. Cal. Civ. Code § 55 (West 2012); *see Turner*, 193 Cal. App. 4th at 1059; *Molski*, 164 Cal. App. 4th at 792. Section 55 also provides narrower relief than that available under section 54.3 in one significant respect: it authorizes only injunctive relief, not damages. *Molski*, 164 Cal. App. 4th at 792. On the other hand, section 55 mandates attorney fees for any prevailing party, whether plaintiff or defendant. Cal. Civ. Code § 55; *Molski*, 164 Cal. App. 4th at 577.

B. A plaintiff's inclusion of a section 55 claim is purely voluntary, as a plaintiff can elect to pursue other state and federal remedies.

A plaintiff is the master of his or her complaint and can decide which laws to rely upon in filing a

lawsuit. *See Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) ("plaintiff is 'the master of the complaint'"); *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987) ("The [well-pleaded complaint] rule makes the plaintiff the master of the claim. . . ."); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("the party who brings a suit is master to decide what law he will rely upon, and . . . does determine whether he will bring a 'suit arising under' the . . . [Constitution or laws] of the United States by his declaration or bill"); *Bell v. Hood*, 327 U.S. 678, 681 (1946) (same).

A plaintiff's decision to plead a section 55 claim is purely *voluntary*, because recovery under section 55 is just one of many legal tools available to disabled individuals for denial of access claims. Pet. App. 31a. If a disabled plaintiff wishes to avoid exposure to the risk of an adverse judgment for attorney fees under section 55, he or she can simply craft his or her complaint to exclude state law claims based on section 55, or opt to file a lawsuit that includes parallel claims in federal court. For example, a plaintiff may decide to forgo relief under section 55, and instead seek relief under the ADA, section 54 of the CDPA, or section 51 of the Unruh Civil Rights Act—statutes that provide potential relief to a disabled plaintiff seeking access, but do not award mandatory attorney fees to the prevailing defendant.

By electing to include a claim for injunctive relief under section 55 in an action brought in state court, a plaintiff *knows* he or she could be exposed to an adverse fee award, and weighs that risk against the benefits of mandatory attorney fees for prevailing plaintiffs and more lenient standing and pleading requirements. A plaintiff should be held accountable for "the consequences of this scorched-earth strategy" of electing to pursue every available statutory option available to enforce his right of access under California law, thereby "maximiz[ing] the litigation expenses of his adversary." *Molski,* 164 Cal. App. 4th at 792.

II. The alleged conflict is limited to California and the Ninth Circuit, and this Court should give the Ninth Circuit an opportunity to overrule *Hubbard.*

In his petition, Jankey does not cite to any other circuit or state supreme court decision that agrees with the Ninth Circuit's decision in *Hubbard.* Moreover, there is no evidence that the conflict between California and Ninth Circuit law will be replicated elsewhere because Jankey has not pointed to any other statutory schemes in other states that mirror section 55. Accordingly, the issue presented by Jankey's petition does not have a widespread impact on multiple circuits, and is therefore not of sufficient significance to warrant review by this Court. Because the conflict regarding ADA preemption only exists between the Ninth Circuit and the California Supreme Court, this Court can allow time for the issue

to percolate to see if the conflict disappears. Given that the *Hubbard* decision provided only a cursory analysis of the preemption issue and did not address the ADA construction clause *at all*, there is every likelihood that the next time the issue arises in the Ninth Circuit, the court will hear the case en banc to overrule *Hubbard*.

III. The California Supreme Court fully considered and correctly determined that section 55 is not preempted by the ADA.

A. The construction clause in the ADA insulates section 55 from preemption.

The construction clause in the ADA provides that "[n]othing in [the ADA] shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by [the ADA]." 42 U.S.C. § 12201(b). Rather than express an intent to displace state law in the field of disability discrimination, Congress envisioned that a plaintiff will be permitted to pursue state law remedies simultaneously with the remedies provided under the ADA, which may potentially provide the plaintiff with equal or greater relief than he or she may be entitled to under the ADA alone. *See Dichner v. Liberty Travel,* 141 F.3d 24, 32 (1st Cir. 1998) ("the ADA anticipates that disabled persons will enjoy the full protection of both federal and state antidiscrimination schemes"); *Wood v. Cnty. of Alameda,* 875 F. Supp. 659, 665 (N.D.

Cal. 1995) ("plaintiffs are free to bring suit under *both* state statutes and the ADA, to the extent that those state laws are consistent with the accomplishment of the federal purposes stated in the federal law").

The California Supreme Court concluded correctly that section 55, as a whole, provides plaintiffs with greater remedies than are afforded by the ADA. First, the standing requirements of section 55 are far more lenient. *See supra* p. 10. Moreover, unlike the ADA, which makes attorney fee recovery for plaintiffs discretionary (42 U.S.C. § 12205), attorney fees for *prevailing plaintiffs* are mandatory under section 55. Consequently, if the plaintiff proves a single violation of a broad range of statutory requirements, of which a violation of the ADA is merely a subset, the plaintiff is guaranteed an attorney fee award under section 55. The risk that a plaintiff will be liable to a defendant for attorney fees if a section 55 injunction claim fails is more than offset by the greater rights afforded a plaintiff.

Jankey argues that "[t]he original sin of the California Supreme Court, from which all other sins flowed, was to conclude that Congress did not expressly preempt state laws that offered less protection for the disabled than the ADA."[2] Pet. 14.

[2] To the extent Jankey is suggesting this case involves express preemption, he is wrong. The ADA's construction clause is not an express preemption clause because it states only what is *not* preempted. *See English v. Gen. Elec. Co.*, 496 U.S. 72,

(Continued on following page)

However, this argument is merely a red herring. As the California Supreme Court found, section 55 provides a disabled plaintiff with *greater* protections than the ADA, and is therefore shielded from preemption. Jankey's contention that section 55 is less protective rests entirely on his assumption that all that matters is what protection or benefit he ultimately obtained from invoking section 55 in this particular case. Clearly, Jankey himself at the time of filing his complaint saw a benefit to adding a section 55 claim to his ADA claim; otherwise he would have omitted it.

B. Section 55's mandatory attorney fee provision is not barred by conflict or obstacle preemption.

The *Jankey* court also properly concluded that conflict and obstacle preemption principles do not apply here. This Court has explained that a state law *actually conflicts* with federal law when it is "impossible for a private party to comply with both state and federal requirements . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English*, 496 U.S. at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Geier v. Am. Honda*

78-79 (1990) (express preemption requires Congress to "define *explicitly* the extent to which its enactments pre-empt state law" (emphasis added)). Moreover, there is no conflict between *Jankey* and *Hubbard* on this issue; both courts treat this issue as one of conflict preemption, not express preemption.

Motor Co., Inc., 529 U.S. 861, 873 (2000) (discussing "conflicts" that *prevent* or *frustrate* the accomplishment of a federal objective and conflicts that make it *impossible* for private parties to comply with both state and federal law) (internal quotation marks omitted); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

"What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute *as a whole* and identifying its purpose and intended effects[.]" *Crosby*, 530 U.S. at 373 (emphasis added). To make this determination, a court must examine the entire statutory scheme and identify the statute's purpose and intended effects when determining whether the state law stands as an obstacle to the purpose of the federal act. "If the purpose of the [federal] act cannot otherwise be accomplished—if its operation within its chosen field [would] be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Id.* (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)); *Pilot Life Ins. Co. v. DeDeaux*, 481 U.S. 41, 51 (1987), *overruled in part on other grounds, Ky. Ass'n of Health Plans v. Miller,* 538 U.S. 329 (2003).

Because section 55 merely provides optional relief that need not be pursued, it necessarily does not conflict with the ADA. Moreover, section 55 does not pose a material obstacle to the objectives of the

ADA,[3] nor does it frustrate federal policy in a material way. To the contrary, and as explained above, a plaintiff seeking to avoid the adverse fee award under section 55 can simply choose to forgo a section 55 claim and assert only federal claims and state law claims that limit attorney fee awards to prevailing plaintiffs.

Moreover, because only the invocation of the state law remedy, and not the ADA, triggers the award of mandatory attorney fees in cases of overlap, it is only the state law remedy, and not the ADA, that stands to be chilled by the broader availability of defense fees. Pet. App. 35a. Plaintiffs can always sue under the ADA alone, safe in the knowledge that even if they lose, defense fees will be available only if a court determines that their suit is frivolous, unreasonable, or groundless. *Id.* Thus, while *Jankey* may inspire reluctance to invoke *section 55 rights*, it will

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[3] Congress has stated that the purpose and objective of the ADA is to remedy widespread discrimination against disabled individuals by enacting a comprehensive national mandate to integrate disabled individuals "into the economic and social mainstream of American life." *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-75 (2001) (citing S. Rep. No. 101-116, at 20 (1989); H.R. Rep. No. 101-485, Pt. 2, at 50 (1990)). To effectuate this broad purpose, the ADA prohibits discrimination against disabled individuals in major areas of public life, among them, public accommodations. *Id.* at 675. The ADA permits reliance on state laws that provide greater protection to effectuate its stated purpose and objective. *See* 42 U.S.C. § 12201(b) (stating that ADA does not preempt state laws providing greater or equal protection for disabled individuals).

not chill disabled defendants from asserting ADA rights or other state law rights.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

March 4, 2013

Respectfully submitted,

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