No. _____

In The

Supreme Court of the United States

LES JANKEY

Petitioner

v.

SONG KOO LEE

Respondent

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than a decade, California courts – both state and federal – have struggled with preemption of state law under the Americans with Disabilities Act of 1990 (ADA). For example, California's Disabled Persons Act (CDPA) provides for mandatory fee awards to prevailing *defendants* who successfully defeat a claim of disability discrimination, including one based on the ADA. The United States Court of Appeals for the Ninth Circuit has held that, since the ADA only awards fees for frivolous claims under the *Christiansburg* standard, any state law that awards fees for non-frivolous ADA violations is necessarily in conflict and thus preempted by the federal act. *Hubbard v. SoBreck, LLC,* 554 F.3d 742 (9th Cir. 2009). Under identical circumstances, however, the California Supreme Court has held that the ADA preserves such fee awards through a savings clause, *viz.*, ADA § 501(b), 42 U.S.C. § 12201(b), which protects state laws from preemption. *Jankey v. Song Koo Lee*, 55 Cal.4th 1038 (Cal. 2012). We cannot overstate the confusion created by the split between the California Supreme Court and the Ninth Circuit on an identical question of federal preemption, or overstress the chaos that will only get worse if the busiest state court and largest federal circuit in the Union cannot agree on such a fundamental issue.

The question presented is:

Whether the ADA preempts CDPA's mandatory fee awards to prevailing defendants, who successfully defeat a claim of disability discrimination, including one based on parallel ADA violations.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the California Supreme Court:

The petitioner here, and plaintiff below, is Les Jankey, a disabled civil rights advocate.

The respondent here, and defendant below, is Song Koo Lee, a grocery store owner and operator in San Francisco's Mission District.

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PETITION FOR WRIT OF CERTIORARI

Les Jankey respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court in this case.

OPINIONS BELOW

The published California Supreme Court opinion at issue can be found at 55 Cal.4th 1038 (Cal. 2012). *Pet. App. 10a-38a.* The amended published opinion of the United States Court of Appeals for the Ninth Circuit is reported at 554 F.3d 742 (9th Cir. 2009). *Pet. App. 1a-9a.* The original Ninth Circuit opinion is reported at 531 F.3d 983.

STATEMENT OF JURISDICTION

The judgment of the California Supreme Court was finalized as a matter of law on January 17, 2013 – 30 days after the opinion was filed. Cal. R. Crt. 8.532(b)(1). This petition was timely filed on January 28, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Section 12201 of Title 42 of the United States Code provides, in relevant part:

(b) Relationship to other laws

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or 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 chapter.

* * * * * * * * * * *

Section 12205 of Title 42 of the United States Code provides in pertinent part:

Attorney's Fees

> In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

* * * * * * * * * * *

Section 54 of California Civil Code provides in pertinent part:

…

(c) A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and nothing in this section shall be construed to limit the access of any person in violation of that act.

* * * * * * * * * * *

Section 54.1 of California Civil Code provides in pertinent part:

…

(d) A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and nothing in this section shall be construed to limit the access of any person in violation of that act.

* * * * * * * * * * *

Section 55 of California Civil Code provides in pertinent part:

Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code … may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees.

STATEMENT OF THE CASE

The undisputed facts in this case are as follows:

Petitioner Les Jankey (Jankey), a wheelchair user, brought an action in California state court against Respondent Song Koo Lee (Lee), the owner of a small grocery store in San Francisco's Mission District. *Pet. App. 11a.* The suit alleged that a four-inch step at the front door of the market, which prevented wheelchairs from entering, was an architectural barrier under state and federal law; and that Lee discriminated against him by failing to remove it. *Pet. App. 11a-12a.* Jankey sought, *inter alia*, an injunction under state and federal law (*i.e.*, the CDPA and ADA), compelling Lee to make his market readily accessible to the disabled. *Pet. App. 12a,* citing Calif. Civil Code § 55 and 42 U.S.C. § 12188(a)(2), respectively. Much to Jankey's surprise, the trial court granted summary judgment in favor of the respondent on the grounds that, even though the market *did* have a four-inch step, and *did* violate disabled access standards, Lee had conclusively established as an affirmative defense that removal of that step was not readily achievable – *i.e.*, it could not be removed without difficulty or expense – and Lee was thus entitled to judgment on all claims.[1] *Pet. App. 12a.* Lee immediately moved for an award of fees under Section 55 of the California Civil Code, which provides that the prevailing party in an action

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[1] Jankey did not appeal the grant of summary judgment, and so the merits of that decision were, regrettably, not reviewed. *Pet. App. 13a.*

to enjoin disability discrimination under the CDPA shall receive a mandatory award of fees. *Pet. App. 12a.* Predictably, Jankey opposed that motion on the grounds that Section 55 was preempted by the ADA, and any such award could be made upon a finding that the complaint was "frivolous, unreasonable, or groundless."[2] *Pet. App. 12a.* As support for this position, Jankey relied heavily on the analysis set out in the federal appellate decision of *Hubbard v. SoBreck* – a case in which the Ninth Circuit was confronted with a situation *identical* to his own.

In *SoBreck*, Lynn and Barbara Hubbard had filed parallel claims under the ADA and CDPA, alleging that architectural barriers deprived them of full and equal access to the restaurant operated by SoBreck, LLC, dba Johnny Carinos.[3] *Pet. App. 2.* Following a two-day bench trial, the district court found that the Hubbards had failed to present sufficient evidence to show that they were denied full and equal enjoyment of the restaurant's services and facilities, and entered judgment in the defendants' favor. *Pet. App. 3a.* Johnny Carinos timely moved for attorney's fees and costs pursuant to the ADA and Section 55. *Pet. App. 3a.* The district court found that the Hubbards' claims were not frivolous and, thus, fees were not warranted under the ADA, which only authorizes fees on frivolous claims. *Pet. App. 3a*, citing 42 U.S.C. § 12205. Section 55, however, not only

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[2] Consistent with common practice, petitioner uses "frivolous" as shorthand for this formulation.

[3] To avoid confusion, petitioner will refer to SoBreck, LLC, by its business name, *viz.*, Johnny Carinos.

authorizes but mandates fees to the "prevailing party," regardless of frivolousness. *Pet. App. 3a.* Because Johnny Carinos' successful defense of a CDPA claim rendered it the "prevailing party," the district court awarded the defendant $80,090.86 in fees under Section 55.[4] *Pet. App. 3a.* The Hubbards appealed, arguing that the mandatory award of fees to a prevailing *defendant* under the CDPA was inconsistent with, and therefore preempted by, the ADA. *Pet. App. 3a.* The Ninth Circuit agreed.

The Ninth Circuit began by observing that, for federal law to preempt state law, it is not necessary that a federal statute expressly declare that it preempts state law. *Pet. App. 4a.* Rather, federal law preempts state law if the state law "actually conflicts" with federal law. *Pet. App. 4a.* With respect to the ADA, federal law makes an award of attorney's fees to the prevailing party discretionary, which courts have interpreted to mean that only plaintiffs who bring frivolous claims are to be saddled with having to pay attorney's fees to the defendant. *Pet. App. 4a.* But Section 55 mandates an award of fees to a prevailing defendant regardless of whether the CDPA claim was frivolous. Given the language of that statute, the Ninth Circuit no doubt concluded that the California Supreme Court would agree that such a provision would be in direct and actual conflict with federal law. *Pet. App. 4a,* citing *Molski v. Arciero Wine Group,* 164 Cal.App.4th 786, 79 (2008).

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[4] *Hubbard v. SoBreck, LLC*, 2007 U.S. Dist. LEXIS 98616, *2 (S.D. Cal. May 16, 2007).

Because the CDPA incorporates an individual's rights under the ADA without limit, Section 55's mandatory imposition of fees on a losing plaintiff who brought both a nonfrivolous ADA action and a parallel (and equally non-frivolous) action under the CDPA would be inconsistent with the ADA, which bars any imposition of fees on the plaintiff. *Pet. App. 5a.* In such a case, the proof required to show a CDPA and ADA violation is identical. *Pet. App. 5a.* It is impossible, the Ninth Circuit reasoned, to distinguish between the fees necessary to defend against the CDPA claim from those expended in defending against the ADA claim, so any grant of fees on the California cause of action would necessarily be a grant of fees as to the ADA claim.[5] *Pet. App. 5a.* Since federal law does not allow the grant of fees to defendants for non-frivolous ADA actions, the Ninth Circuit concluded that preemption principles preclude imposing fees on a disabled plaintiff for bringing nonfrivolous claims under state law that parallel claims filed under the federal law. *Pet. App. 5a.*

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[5] In arriving at this decision, the Ninth Circuit clearly understood that California state courts had interpreted Section 55 to permit the recovery of attorney's fees, even where the plaintiff's claim is not frivolous, and that their holding would (probably) be rejected by the California Supreme Court. *Pet. App. 4a, 9a,* citing *Molski,* 164 Cal.App.4th at 791. Accordingly, the Ninth Circuit held that, to the extent that Section 55 authorizes the award of fees to a prevailing defendant for nonfrivolous CDPA state claims that parallel nonfrivolous ADA claims, there is a conflict and the ADA preempts that state law. *Pet. App. 9a.*

Unfortunately, the trial judge in *Jankey* was unconvinced by the Ninth Circuit's decision. Without directly addressing preemption (and with no finding of frivolousness), the trial court concluded that Lee was entitled to a mandatory fee award under *Molski v. Arciero Wine Group* and gave him $118,458 in fees, more than 90% of the approximately $130,000 originally sought. *Pet. App. 13a.* Jankey timely appealed that award but the California court of appeals affirmed. *Pet. App. 13a.* "Respectfully" disagreeing with the Ninth Circuit's preemption analysis, the California court of appeals concluded that a fee award was both required by state law and permitted under federal, and upheld the trial court's fee award in its entirety. *Pet. App. 13a.* Jankey thereupon petitioned the California Supreme Court to address the conflict between the Ninth Circuit's opinion in *SoBreck* and the California court of appeal's decision in his case. *Pet. App. 13a.* The California Supreme Court granted Jankey's petition but, unfortunately, things didn't get much better.

Recognizing that Congress intended for courts to adhere to the principles set forth in *Christiansburg Garment Co. v. EEOC* when awarding fees to prevailing defendants under the ADA, the California Supreme Court refused to believe that Congress intended to extend the "more stringent federal standard" to preempt state laws that offered less protection than the federal act. *Pet. App. 21a-22a, 34a-35a*, citing 34 U.S. 412 (1978). In summary, California's highest court flat-out rejected the Ninth Circuit's view that Congress intended to provide a measure of protection to disabled plaintiffs from paying the prevailing defendant's attorney fees bill,

absent a showing of frivolousness under the *Christiansburg standard*, or preempt lesser state laws. *Pet. App. 31a, 33a.*

Beginning with the plain language of the statute, the California Supreme Court read the ADA's construction clause, *viz.*, ADA § 501(b), as disavowing any expressed intent to preempt. *Pet. App. 23a.* Instead, the court chose to see it as a savings clause, which distinguished state laws that afforded equal or better protection to the disabled than that afforded by the ADA from those state laws that afforded less protection. *Pet. App. 23a.* Laws in the former category were shielded from preemption, while laws in the latter category were, by negative implication, not shielded from preemption. *Pet. App. 23a-24a.* What the clause did *not* do, however, was evince a Congressional intent to preempt lesser state laws, which would only be invalid to the extent that standard conflict or obstacle preemption principles required their displacement. *Pet. App. 24*a. But determining what laws were shielded from preemption was not a simple question, as neither the text of the construction clause nor any other language in the Act explained how to determine whether a law afforded "equal or greater protection" than that of the ADA. *Pet. App. 25a.*

In order to make that determination, the California Supreme Court turned to the legislative history for "insight;" and that insight, according to California's highest court, revealed that Congress did *not* want to preempt inferior state laws; but, rather, to maximize the number of remedies available to disabled plaintiffs – even if those remedies were less

inclusive or offered less relief than the ADA. *Pet. App. 26a-27a.*

The only legislative material cited in support of this interpretation, however, was a House Judiciary Committee's report (*Pet. App. 26a*), which contained an example of a state law shielded from preemption – *viz.*, California's Fair Employment and Housing Act (FEHA). At the time, the FEHA, unlike the ADA, did not protect the mentally disabled from discrimination. *Pet. App. 26a.* What it did was offer superior damage remedies for the *physically* disabled. *Pet. App. 26a.* Because the ADA covers mental disabilities, Congress recognized that the FEHA could be construed as not conferring equal or greater rights than the ADA. *Pet. App. 26a.* By adding ADA § 501(b), Congress ensured that state laws such as the FEHA, which offered the same protections as – and greater remedies than – the ADA to the *physically* disabled, were not preempted. *Pet. App. 26a.* From this example, the California Supreme Court extrapolated that if *some* part of a state remedial scheme was in any way superior to the ADA, the entire scheme would survive. *Pet. App. 26a-27a.* In effect, the court opted for a cafeteria approach where the disabled could pick and choose the relief they consider most advantageous from state and federal remedies. *Pet. App. 27a.*

Applying this analysis to the CDPA, the California Supreme Court thought it evident that Section 55 was saved from preemption because it affords, at least in some respects, greater protection than the ADA; *e.g.*, standing is broader; the potential for fee awards is greater; and the range of access requirements is wider. *Pet. App. 27a-28a.* It didn't matter that other aspects of Section 55 might be "less advantageous," or that none of these benefits were available in Jankey's particular lawsuit. *Pet. App. 29a.* What *did* matter was that, as interpreted by the California Supreme Court, Congress wanted to relieve courts of the burden of having to determine whether a state law was equally or more advantageous than the ADA, and thus "saved" from preemption. *Pet. App. 29a.* That responsibility would instead fall to disabled plaintiffs who – by bringing a state law claim – would determine for themselves whether it offered them equal or greater protections than the ADA. *Pet. App. 29a-30a.*

But even without the saving clause, the California Supreme Court rejected the idea that mandatory fee awards to prevailing defendants under state law for federal violations conflicted with the ADA, or stood as an obstacle to the purposes and objectives of Congress. *Pet. App. 34a.* Rather, the court believed that the equitable considerations set forth in *Christiansburg* were intended to avoid chilling the assertion of ADA claims – *not* state law claims, even if they mirrored federal law. *Pet. App. 34a-35a.* If California wants to chill disability discrimination claims under the CDPA, including ones which are 100% predicated on parallel ADA violations, then California has every right to do so. *Pet. App. 33a.* It

doesn't matter that a particular state law claim wasn't frivolous under the *Christiansburg* standard, or that the defendant wasn't entitled to fees under the ADA. *Pet. App. 35a.* Because the fee awarded is a consequence of the purely voluntary decision to seek additional state remedies (*Pet. App. 31a*), and Congress never intended to immunize disabled plaintiffs from paying defendants' fees when seeking overlapping state remedies (*Pet. App. 33a*), the California Supreme Court concluded that, so long as the ADA's remedies and enforcement mechanisms remained undisturbed, awarding *mandatory* fees to the defendants under Section 55 for CDPA claims based on the ADA was fully consistent with Congress' objectives. *Pet. App. 35a-36a.* With that, Lee's original $118,458 fee award was affirmed and, as the prevailing party under Section 55, the court granted his request for costs and additional attorney fees on appeal. *Pet. App. 38a.*

ARGUMENT

It is a fundamental principle of the Constitution of the United States that Congress has the power to preempt state law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-3 (2000); U.S. Const., Art. VI, cl. 2. *Expressed preemption* normally occurs when Congress explicitly states a clear intent – in either the language of the federal statute or its legislative history – to preempt state law. *Shaw v. Delta Air Lines*, 463 U.S. 85, 95 (1983); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). Absent explicit preemptive language, this Court has recognized at least three types of *implied* pre-emption: *field pre-emption*, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it;[6] *conflict preemption*, where compliance with both federal and state law is a physical impossibility; and *obstacle preemption*, where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Gade*, 505 U.S. at 98 (citations and quotes omitted). In deciding whether federal law implicitly preempts state law, the court's task is simply "to determine whether state [law] is consistent with the structure and purpose of the [federal] statute." *Id.* at 98-99. When an inconsistency exists, state law must yield, even if the state law involves an area that has traditionally been a subject of state regulation. *Free v. Bland,* 369 U.S.

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[6] Petitioner does not claim that Congress intended to occupy the field of disability discrimination.

663, 666 (1962). The presumption against implied preemption can be overcome in two situations: (1) if there is an irreconcilable conflict between the provisions in the two acts; or (2) if the later act was clearly intended to "cover the whole subject of the earlier one." *Branch v. Smith*, 538 U.S. 254, 285 (2003), quoting *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936). As petitioner will demonstrate, there is a clear and unequivocal inconsistency between the CDPA's mandatory fee award in favor of a prevailing defendant and the ADA's discretionary award, and this inconsistency represents an irreconcilable conflict between the two acts as interpreted by the California Supreme Court and the United States Court of Appeals for the Ninth Circuit.

I. The California Supreme Court was wrong when it held that Congress never intended to preempt state laws that violate the minimum level of protections afforded under the ADA.

The 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. This was an obvious error. The ADA was not written in a vacuum; it was inspired by the other federal civil rights laws of the time. In fact, Congress made no secret that it was patterning the ADA after these other civil rights laws – lifting whole-swaths of protections and inserting them into the new Act. Not surprisingly, Congress intended for the ADA to

operate in a manner consistent with these other civil rights laws, too.[7] H.R. Rep. No. 101-485(II), p. 135 (May 15, 1990), reprinted 1990 U.S.C.C.A.N. 303, 418; H.R. Rep. No. 101-485(III), p. 70 (May 15, 1990), reprinted 1990 U.S.C.C.A.N. 445, 493. At the time, these other federal civil rights laws not only preempted conflicting state antidiscrimination statutes, but courts recognized that the congressional intent to do so was both clear and expressed. *New York Gaslight Club v. Carey*, 447 U.S. 54, 67-68 (1980) (Congress' intent to pre-empt state civil rights law has been clearly expressed); *Cal. Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 281 (1987), discussing 42 U.S.C. §§ 2000e-7, 2000h-4 ("Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law"). Not surprising, one does not need to look hard to find a similarly clear expression with respect to the ADA.

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[7] There are *literally* thousands of instances in which Members of Congress confirmed that the ADA was patterned after existing civil rights laws (*e.g.*, the Fair Housing Amendments Act of 1988, the Rehabilitation Act of 1973, the Civil Rights Act of 1964, etc.), and that Congress intended to extend those same protections to the disabled in the ADA. *See, e.g.,* H.R. Rep. No. 101-485(II), at p. 104, reprinted 1990 U.S.C.C.A.N. at 387 ("[The ADA's] general prohibitions are patterned after … other civil rights laws that prohibit discrimination on the basis of race, sex, religion, or national origin."). Ergo, unless the respondent seriously intends to dispute this point, we will not reprint those instances here.

Conference reports – the most persuasive evidence of congressional intent next to the plain language of the statute itself (Sutherland at § 48.8) – show that Congress intended to preempt state laws that violated the minimal standards of the ADA. *Conference Report on S. 933, Americans with Disabilities Act of 1990*, 136 Cong Rec H 4582, 4598, 4604 (July 12, 1990), amending 136 Cong Rec H 4169 (June 26, 1990). In fact, Congress was so concerned about the ADA preempting legitimate state and local public health laws that the Senate added a special section, *viz.*, ADA § 103(e)(3), to save them. *Id.* at 4598, citing 42 U.S.C. § 12113(e)(3). This new section was intended to "amplify" ADA § 501(b), and make clear how the Act's general anti-preemption provision interacts with food handling laws. *Ibid.* In so doing, Congress explained how public health laws must satisfy the minimum protections afforded under the ADA to avoid preemption. *Ibid.* For example, a disease control law designed to protect the public by placing certain requirements on employees, but which did not otherwise discriminate against the disabled, would not be "affected or preempted" because the ADA itself allows adverse actions to be taken against employees who pose a direct threat to the health or safety of others. *Id.* at 4598, 4604. By extension, state laws would be preempted if they violated those minimum protections and thus affected the disabled in a manner *proscribed* by the ADA. *Ibid.* As the conference report illustrates, Congress wasn't interested in saving *all* state and local public health laws, much less balancing the benefits of the entire public health scheme with the burdens of less protections for the disabled. Instead, Congress created a bright-line test in which states

could determine whether a law was preempted. *Id.* at 4598, 4604. Members of Congress overwhelmingly expressed similar sentiments, with the ADA's strongest supporters and harshest critics both recognizing the existence of ADA preemption and discussing the instances upon which it would arise.[8]

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[8] **Supporters**: 136 Cong Rec E 1913, 1917 (Rep. Hoyer) (June 13, 1990), citing ADA § 501(b) ("ADA does not preempt other applicable laws that provide equal or greater protection."); 136 Cong Rec H 4614, 4626 (July 12, 1990) (Reps. Waxman, Hoyer) ("Simply asserting that a law is for public health will not be enough to protect it from preemption."); 136 Cong Rec H at 4626 (Rep Hammerschmidt) (ADA § 501 clearly defines the type of state and local laws that are not preempted by the ADA); 136 Cong Rec S 9527, 9534 (July 10, 1990) (Sen. Durenberger) (listing communicable diseases will help avoid Federal preemption of public health laws by ADA); 135 Cong Rec S 10734, 10751-52 (Sept. 7, 1989) (Sen. Harkin) (ADA would not preempt States from adopting laws to allow state attorneys general to prosecute ADA claims); 136 Cong Rec S 9684, 9687 (July 13, 1990) (Sen. Harkin) (food handling laws will not be preempted when a health and safety risk cannot be eliminated through a reasonable accommodation).

Opponents: 135 Cong Rec S at 10741 (Sept. 7, 1989) (Sen. Pryor) ("This legislation basically preempts all State and local laws and regulations regarding the access for the disabled."); 136 Cong Rec S at 9533 (July 11, 1990) (Sen. Hatch) ("concerned that [ADA § 501] language may provide for the preemption of State and local ordinances which protect the public health.")

Even the Committee Reports from the House of Representatives – the very same legislative material cited by the California Supreme Court as *support* for its interpretation – confirmed this expressed intent to preempt lesser state laws. Setting aside the mandate that ADA preemption be construed in the same manner as other civil rights laws, which also expressly preempted lesser state laws, the House Judiciary Committee's report does *not* show Congress embracing a "cafeteria approach," where all state laws are preserved no matter what their level of protection. *Cf.,* H.R. Rep. No. 101-485 (III), at p. 70, reprinted 1990 U.S.C.C.A.N. at p. 493. Accord, H.R. Rep. No. 101-485(II), at p. 135, reprinted 1990 U.S.C.C.A.N. at 418. Instead, the report shows – in the sentence introducing the FEHA example, ironically enough – that Congress only intended to save state laws with fewer substantive rights if (1) the plaintiff's situation was otherwise protected under that alternative law, and (2) the remedies were greater. *Ibid.* ("A plaintiff may choose to pursue claims under a state law that does not confer greater substantive rights, or even confers fewer substantive rights, *if the plaintiff's situation is protected under the alternative law and the remedies are greater*") (italics added). This is why the FEHA survived preemption: it offered the *same protections* for the physically disabled but *greater remedies*. *Ibid.* This is also why the California Legislature immediately amended the FEHA to protect the "mentally disabled" from discrimination: the legislature understood that the FEHA needed to comply with the ADA, which superseded the old definition of disability. Stats 1992, Chap. 913 (AB 1077), Preamble, § 15, reprinted 1992 Cal ALS 913. This

legislative material is *devastating* to the California Supreme Court's analysis in *Jankey*, as it shows Congress intending to preempt state laws that violated the ADA's minimum protections, and the California Legislature's intent to amend state statutes based on a similar understanding. Moreover, it undercuts the California Supreme Court's misbegotten belief that ADA § 501(b) does not evince a Congressional intent to preempt lesser state laws. *Pet. App. 25a, 30a.*

Everyone agrees that ADA § 501(b) is a preemption-saving clause for state laws that offer equal or greater protection for the disabled. *Pet. App. 23a-24a.* Where California's highest court ran off the rails was to conclude that, even though less protective laws were excluded from the text of ADA § 501(b), Congress really didn't want to exclude them, (*Pet. App. 24a*); and that ADA § 501(b) actually evinces Congress' intent to relieve courts of their well established duty to determine if a statute is preempted as a matter of law. *Pet. App. 29a.* This is nonsense. Nothing in the ADA's legislative history even suggests such an "all or nothing" approach to preemption, much less that Congress wanted to transfer such a crucial judicial function – *i.e.*, determining whether a state law conflicts with Congressional intent and is thus preempted by federal law under the U.S. Constitution – to the disabled plaintiff and his counsel. Yet, by twisting one example, cherry-picked from thousands of pages of legislative material, the California Supreme Court has divined a Congressional mandate for plaintiffs to assume the role of judges (because the courts can now abdicate this responsibility); and to excuse all

state laws if *one statute* could afford, in at least one regard, greater protection for the disabled than that which is provided by the ADA. *Pet App. 30a.* Such a line of argument finds no support in either logic or the law and should be rejected outright.

II. The Ninth Circuit was correct when it concluded that a state law authorizing the mandatory award of attorney fees to prevailing *defendants* for claims that are based on non-frivolous ADA violations is necessarily preempted, and the California Supreme Court was wrong to disagree with them.

It is undisputed by both court and counsel that Jankey's CDPA claim for injunctive relief was based *entirely* on violations of the ADA or its standards. Despite this "overlap," the California Supreme Court believed that defending a state law claim to remove ADA violations was somehow *different* than defending a federal claim to remove those same ADA violations. *Pet. App. 31a.* Nor did the court have any difficulty in calculating fee awards under such a state law claim: it merely multiplied the fees incurred from defending the ADA claim by one. *Pet. App. 32a-33a.* Based on that belief, California's highest court was perfectly happy to affirm the $118,458 award; after all, Lee wasn't awarded fees because Jankey brought a non-frivolous ADA claim but, rather, because he brought a nonfrivolous CDPA claim based entirely on ADA violations. *Pet. App. 31a, 32a.* In so doing, the court disagreed with the Ninth Circuit's analysis and conclusion that Congress established rules for awarding attorney fees under overlapping state law

claims,[9] as it discerned no such intent in the text of the ADA or the available committee reports. *Pet. App. 33a.* From this the court concluded that, without congressional intervention, California has every right to adopt whatever fee regime it deems appropriate. *Pet. App. 33a.* Like its analysis on expressed preemption, however, the *Jankey* analysis on conflict preemption is equally flawed. One needs to look no further than the very first section of the ADA to see Congress' finding that, unlike other minorities, the disabled often had no legal recourse to redress discrimination (42 U.S.C. § 12101(a)(4), ADA § 2(a)(4)); and that the purpose of the Act was "to provide clear, strong, *consistent*, enforceable *standards* addressing discrimination against [the disabled.]" 42 U.S.C. § 12101(b)(2), ADA § 2(b)(2) (emphasis added) (modified). In light of the plain language and legislative history behind the ADA's construction clause, the argument can be made (and fairly so) that Congress wanted the *Christiansburg* standard applied consistently to all fee awards involving all disability discrimination, especially those predicated on the ADA. More compelling, however, is that we are not the only ones to think so.

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[9] The California Supreme Court even criticized the Ninth Circuit because the federal court's single paragraph discussion on the principles of conflict preemption failed to address ADA § 501(b), which was in marked contrast to the *two paragraphs* used by California's highest court, which also did not address ADA § 501(b).

The California Legislature amended the CDPA in 2008 to explicitly acknowledge and confirm that fee awards under Section 55 "reflect the longstanding principle that when a party prevails in a civil rights case the amount of attorney's fees to be awarded is based upon *equitable considerations*[.]" Stats 2008, Chap. 549 (SB 1608), § 9(a), reprinted 2008 Cal ALS 549 (emphasis added). The phrase *equitable considerations* is a direct reference to the *Christiansburg* standard, wherein this Court distinguished between the award of fees to plaintiffs and defendants in civil rights cases, arguing that there were at least two "strong equitable considerations" in awarding fees to plaintiffs that are "wholly absent in the case of a prevailing [] defendant." *Christiansburg Garment Co.*, 434 U.S. at 418. In other words, much like the FEHA amendments, the California Legislature behaved in a manner that was perfectly consistent with the Ninth Circuit's views on conflict preemption.

It should be noted that the Third Circuit opinion in *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565 (3rd Cir. 2002) offers no quarter for the *Jankey* analysis. In *Gagliardo*, the plaintiff sued under the ADA and a "virtually identical" state statute, obtaining a $2.5 million judgment undifferentiated as between the two claims. *Id.* at 570. The defendant argued on appeal that, because the federal law capped damage awards under the ADA and "all similar claims in a single lawsuit," the plaintiff's greater damage award under state law should be similarly capped and the judgment reversed. *Ibid.*, citing 42 U.S.C. § 1981a(b)(3). The Third Circuit disagreed. Adopting the reasoning

from sister circuits, including the Ninth Circuit, the *Gagliardo* court explained that nothing prevented a state law from providing a remedy *beyond* its federal counterpart (*viz.*, the ADA); and to hold otherwise would violate ADA § 501(b)'s prohibition on limiting state remedies that provide for *greater* recovery to the disabled than the corresponding federal law. *Id.* at 570-1 (citations omitted).

According to the California Supreme Court, however, *Gagliardo* stands for the proposition that "a nearly identical state law claim does not automatically become an award under the ADA, even if it involved the same work, and thus need not conflict with the ADA's limits on defense attorney fees." *Pet. App. 32a.* This interpretation is problematic for two reasons: *First*, *Gagliardo* didn't deal with a state law that offered *less* protection than the ADA; it dealt with a state law that offered *more*. There are literally hundreds of cases on the books in which courts recognized that ADA § 501(b) saves state laws that offer greater protections and remedies for the disabled; and suggesting that *Gagliardo* somehow supports increased fees to the *defendant* because it awarded increased fees to the *plaintiff* is ludicrous on its face. *Second*, Jankey never argued, and the Ninth Circuit never held, that a state claim converts into a federal claim if it is based on an ADA violation. It doesn't. We never said that it did. And we are at a loss to understand why the California Supreme Court would rebut a straw man argument that no one made.

What the Ninth Circuit has held, and what Jankey has argued from day one, is that it is impossible to award fees for the defense of a Section 55 claim based on non-ADA violations and *not* award fees under the ADA for the exact same violations. Worse, the ADA allows a defendant to recover reasonable attorney's fees when, and only when, that claim was frivolous (*i.e.*, the "but-for test"). *E.g., Fox v. Vice*, ---U.S. ---, 131 S.Ct. 2205, 2215 (2011) ("Section 1988 permits the defendant to receive only the portion of his fees that he would not have paid but for the frivolous claim"). Under the *Jankey* analysis, however, California courts can now transfer the expense of defending the same ADA claim to the disabled plaintiff under Section 55. *Ibid.*

Suppose, for example, that a defendant's attorney conducts a deposition on matters relevant to the ADA violations supporting an ADA claim – and more, that the lawyer would have taken and committed the same time to this deposition even if the case had involved only an ADA claim. If the disabled plaintiff included a CDPA claim based on those same ADA violations, as Jankey did here, the defendant would have incurred the exact same expense in any event, and he would have suffered no incremental harm (for lack of a better term) from the state law claim than under the federal claim. A standard allowing more expansive fee-shifting under Section 55 would furnish windfalls to some defendants, making them better off because they discriminated against the disabled, and would allow courts to shift the cost of defending against non-frivolous ADA claims to the disabled plaintiff.

Assume, for another example, that two defendants (call them Lee and Gee) faced identical, non-frivolous ADA violations. Because Lee was fortunate enough to confront, in addition to the ADA claim, a Section 55 claim (based on those same violations), he could end up *receiving* an award of fees from the disabled plaintiff for the same work performed in defending against the non-frivolous ADA claim, while Gee would not receive any such windfall. Congress did not want disabled plaintiffs paying defense attorney fees for non-frivolous ADA claims; and the California Supreme Court's rationale – *i.e.*, we aren't awarding defense fees for federal claims based on non-frivolous ADA violations, we are awarding them for the non-frivolous state law claims based on the identical ADA violations – is a clever argument that must ultimately fail.

III. As interpreted by the California Supreme Court, California law stands as an obstacle to the purposes and objectives of Congress to enable disabled individuals to bring lawsuits based on non-frivolous ADA violations without the fear (or burden) of having to pay the defendant's attorney fees.

The California Supreme Court devotes considerable space in its opinion advancing the idea that mandatory fee awards under state law – more than $122,000.00 in this single case alone – to prevailing defendants for nonfrivolous ADA violations is somehow consistent with the purposes and objectives of Congress. *Pet. App. 34a.* Of course, this idea presupposes that Congress' only objective and purpose when enacting the ADA was to allow

disabled plaintiffs to bring ADA lawsuits. *Pet. App. 36a.* This simply was not the case. A review of the finding and purpose section of the Act (*i.e.*, ADA § 2), shows that, as a group, the disabled occupy an inferior status in American society, and are severely disadvantaged socially, vocationally, economically, and educationally.[10] 42 U.S.C. § 12101(a)(6). The purpose of the ADA, not surprisingly, was to eliminate that disparity, not simply grant the disabled the right to sue parties who fail to comply with federal law. 42 U.S.C. § 12101(b). Candidly, it is hard to imagine a greater obstacle to that purpose than to force a member of this poverty-stricken, economically-underprivileged group of Americans to pay six-figure fee awards for no other reason than they filed, but ultimately lost, a non-frivolous claim for disability discrimination based on ADA violations – especially when Congress stated, in no uncertain terms, that it only wanted prevailing defendants to

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[10] Individual members of Congress made similar findings. 135 Cong Rec S 4984, 4985 (May 9, 1989) (Sen. Harkin); 136 Cong Rec S 9684, 9693 (July 13, 1990) (Sen. Reigle) ("Currently, the disabled are more likely to be poor and unemployed than the nondisabled"); 135 Cong Rec E 1575, 1575 (May 9, 1989) (Rep. Coelho) ("Colossal unemployment and poverty among the disabled often goes unchallenged because the public has the general impression that these are the inevitable results of disabling conditions"); 135 Cong Rec H 1690, 1690 (May 9, 1989) (Rep. Coelho) ("Most people do not regard disabled persons as … an economically disadvantaged group. But these stereotypes – like most stereotypes – are untrue"). Accord, H.R. Rep. No. 101-485(II), at p. 31, reprinted 1990 U.S.C.C.A.N. at 313; and H.R. Rep. No. 101-485 (III), at pp. 25-26, reprinted 1990 U.S.C.C.A.N. at p. 447-449.

receive an award of fees *if the action was frivolous*.[11] Nor is this affront lessened if one focuses solely on the application of Section 55 to this case. The House Judiciary Committee report, which served as the sole basis for the California Supreme Court's views on congressional intent and obstacle preemption, shows (once again) that two criteria must be met to preserve a statute from preemption: (1) the plaintiff's situation must be protected under that alternative law, and (2) the remedies must be greater. *Pet. App. 35a-36a*, citing H.R. Rep. No. 101-485 (III), at p. 70, reprinted 1990 U.S.C.C.A.N. at p. 493. As applied to this case, Jankey's remedies were equal, not greater, because his CDPA claim was based entirely on the ADA violations and parallel ADA standards. Worse, his protections were *less* under Section 55, which does not – according to the California courts – apply the *Christiansburg* standard to fee awards. The California Supreme Court's rationale for affirmance thus fails under the very metric they established for themselves.

Boiled to its essence, Congress wanted disabled individuals to be able to bring lawsuits to adjudicate ADA violations, and only wanted prevailing defendants to receive an award of attorney fees if those alleged violations turned out to be frivolous. Thus, whether a given lawsuit is brought under state or federal law is beside the point. By affirming a fee award to defend against a lawsuit based on non-

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[11] H.R. Rep. No. 101-485(II), at p. 117, reprinted 1990 U.S.C.C.A.N. at 423; H.R. Rep. No. 101-485 (III), at p. 73, n. 77, reprinted 1990 U.S.C.C.A.N. at p. 496.

frivolous ADA violations, even ones brought under the CDPA, the California Supreme Court knowingly chilled the very conduct that Congress sought to encourage. *Pet. App. 36a* (mandatory fee awards "may inspire reluctance to invoke section 55 rights, but that is a matter for the Legislature to consider; it is no concern of Congress's, and it is no basis for finding preemption"). Simply and starkly put, under the circumstances of *this particular case*, Section 55 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, namely, for disabled plaintiffs to bring lawsuits based on non-frivolous ADA violations without the fear or burden of paying the defendant's attorney fees. *See, e.g. Crosby*, 530 U.S. at 373 quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The California Supreme Court's conclusion otherwise cannot be left to stand.

CONCLUSION

Anatole France once famously quipped, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[12] Yet it is with the same magnanimous flourish or purported "equity" that the California Supreme Court has parsed the remedies available to the disabled under state and federal law, concluding that a non-frivolous civil rights anti-discrimination action brought in good faith that *cannot* result in a fee award under federal law *must*

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[12] *The Red Lily* (1894), as quoted in "Books and Writers" http://www.kirjasto.sci.fi/afrance.htm.

result in a massive (and bankrupting) fee award under state law – and somehow – *voila*! – Congress did not and cannot preempt such a grossly inequitable result. Could there be a more perfect example of "hay for the ox and hay for the lion are not equal?" For the foregoing reasons, this Court should grant this petition for certiorari, reverse the judgment of California Supreme Court, and remand this back to that state court for further proceedings.

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January 29, 2013

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-56870

LYNN J HUBBARD, BARBARA J HUBBARD,

Plaintiffs and Appellants,

V.

SOBRECK, LLC,

Defendant-Appellee,

AND

EASTLAKE VILLAGE MARKETPLACE LLC,

Defendant,

ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted
May 12, 2008

Filed June 27, 2008
Amended January 12, 2009

Before: Schroeder, Silverman, and Berzon,
Circuit Judges

Opinion by Judge Schroeder

ORDER

The Opinion filed June 27, 2008, is hereby amended. With the filing of the Amended Opinion, the panel has voted to deny the petition for panel rehearing. No further petitions for rehearing may be filed.

OPINION

SCHROEDER, Circuit Judge:

Plaintiffs-appellants Lynn and Barbara Hubbard filed parallel claims for violations of both the Americans with Disabilities Act ("ADA") and the California Disabled Persons Act ("CDPA"). Their complaint alleged barriers that deprived them of full and equal access to the restaurant operated by defendants-appellees SoBreck, LLC, dba Johnny Carino's. We consider whether the district court properly awarded attorney's fees to defendants under the California Act, in circumstances where fees were not authorized under the federal ADA. We hold that the award of fees under state law was preempted by federal law.

I. Background

Plaintiffs' complaint originally alleged thirty-eight violations of federal and California statutes, many of which were settled in a settlement agreement prior to trial, and others which were abandoned before trial. The district court considered the remaining charges during a two-day bench trial. It found that plaintiffs failed to present sufficient evidence to establish they were denied full and equal enjoyment of the restaurant's services and facilities. The court entered a judgment in defendants' favor on all of plaintiffs' remaining claims. Defendants subsequently moved for attorney's fees and costs pursuant to the ADA and Section 55 of the CDPA.

The district court found that plaintiffs' claims were not frivolous and that fees were not warranted under the ADA, which authorizes fees only on frivolous claims. Section 55 of the CDPA, however, authorizes fees to the "prevailing party." The district court awarded fees to the defendants under this section.

The principal issue on appeal is whether the award of fees to a prevailing defendant under the CDPA is inconsistent with, and therefore preempted by, the ADA. The issue of preemption was not raised below, so the district court did not have an opportunity to rule on it. It is an issue of law, however, which may be considered for the first time on appeal. *See Bolker v. Comm'r,* 760 F.2d 1039, 1042 (9th Cir.1985). Because our district courts have been called upon, from time to time, to consider whether fees may be awarded to a prevailing

defendant under Section 55 when fees are precluded by the ADA, we consider the issue.

II. Analysis

We begin by observing that for federal law to preempt state law, it is not necessary that a federal statute expressly state that it preempts state law. Federal law preempts state law if the state law "actually conflicts" with federal law. *Cal. Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 280-81, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987) ("*Cal.Fed.Sav.*"). In this case, federal law, the ADA, makes an award of attorney's fees to the prevailing party discretionary. It provides that "[T]he court or agency, in its discretion, *may* allow the prevailing party ... a reasonable attorney's fee ...."42 U.S.C. § 12205 (emphasis added). Courts have interpreted this to mean that only plaintiffs who bring frivolous claims are to be saddled with paying attorney's fees to the defendant. *See Summers v. Teichert & Son, Inc.,* 127 F.3d 1150, 1154 (9th Cir.1997). We use the term "frivolous" in this opinion as a shorthand term for the full statutory phrase.

Under the California statute, however, as interpreted recently by the California Court of Appeal, *Molski v. Arciero Wine Group,* 164 Cal.App.4th 786, 79 Cal.Rptr.3d 574 (2008), an award to a prevailing defendant does not turn on whether the plaintiff's claim was frivolous. Fees are not discretionary; they are mandatory. Section 55 provides, "The prevailing party in the action *shall* be entitled to recover reasonable attorney's fees." Cal. Civ. Code § 55 (emphasis added). Given this

language, we have no basis for doubting that the California Supreme Court will agree with *Molski* as to the meaning of Section 55. *See Klingebiel v. Lockheed Aircraft Corp.,* 494 F.2d 345, 346 n. 2 (9th Cir.1974) ("Decisions of the California Courts of Appeal are to be followed by a federal court where the Supreme Court of California has not spoken on the question, in the absence of convincing evidence that the highest court of the state would decide differently.") (internal quotation marks and citations omitted).

A violation of the federal ADA constitutes a violation of the CDPA. *See, e.g.,* Cal. Civ. Code §§ 54(c), 54.1(d), 54.2(b). Therefore, to the extent that California's Section 55 mandates the imposition of fees on a losing plaintiff who brought both a nonfrivolous ADA action and a parallel action under Section 55, an award of attorney's fees under Section 55 would be inconsistent with the ADA, which would bar imposition of fees on the plaintiff. In such a case, the proof required to show a violation of the CDPA and of the ADA is identical. In that circumstance, it is impossible to distinguish the fees necessary to defend against the CDPA claim from those expended in defense against the ADA claim, so that a grant of fees on the California cause of action is necessarily a grant of fees as to the ADA claim. As federal law does not allow the grant of fees to defendants for non-frivolous ADA actions, we must conclude that preemption principles preclude the imposition of fees on a plaintiff for bringing nonfrivolous claims under state law that parallel claims also filed pursuant to the federal law. *See Cal. Fed. Sav.,* 479 U.S. at 280-81, 107 S.Ct. 683.

In defense of the fee award in this case, defendants rely on two federal district court cases that awarded attorney's fees to prevailing defendants under the CDPA, even though the claims were not frivolous under the ADA. *See Jones v. Wild Oats Markets, Inc.,* 467 F.Supp.2d 1004 (S.D. Cal. 2006); *Goodell v. Ralphs Grocery Co.,* 207 F.Supp.2d 1124 (E.D. Cal. 2002). Neither of these cases, however, considered the issue of preemption.

In *Goodell,* the district court expressly decided not to award attorney's fees under the ADA because the plaintiff's claims were not frivolous. 207 F.Supp.2d at 1125-26. It imposed fees under Section 55, holding that the imposition of fees on the prevailing party was not discretionary under the state statute. *Id.* at 1126, 1128, 1129. The opinion, however, looked only to the language of the statutes and did not consider the issue of preemption, which was apparently not raised.

In *Jones,* the district court awarded fees under the CDPA on all five of the claims on which the defendant prevailed. It awarded fees under the ADA for only the two of those claims that the district court found "lacked an arguable basis in fact or law and were frivolous." 467 F.Supp.2d at 1017. The court in *Jones* relied on *Goodell,* and likewise did not consider the issue of preemption.

The district court's decision in a third case, *Edwards v. Princess Cruise Lines, Ltd.,* 471 F.Supp.2d 1032 (N.D.Cal.2007), is consistent with the result we reach here, although it did not discuss preemption. In *Edwards,* the district court did not award fees under the ADA because it ruled the plaintiff's claims were not frivolous. *Id.* at 1033. The district court also declined to award fees under Section 55, even though it had granted defendant's motion for summary judgment. As the district court noted, Section 55 itself does not define "prevailing party." *Id.* The defendant urged the definition of "prevailing party" as found in California Code of Civil Procedure § 1032(a)(4), and which was relied upon in *Goodell* and *Jones.* That statute defines the term "prevailing party" for purposes of awarding costs: "As used in this section, unless the context clearly requires otherwise: 'Prevailing party' includes ... a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." *Id.* at 1033 & n. 1 (quoting Cal. Civ. Proc. Code § 1032(a)(4)).

The *Edwards* court rejected this definition, holding that a prevailing party entitled to costs under § 1032 is not necessarily entitled to fees under Section 55. *Id.* at 1033-34. The court in *Edwards* held that California courts have some discretion under Section 55 to determine "whether there was a prevailing party on a practical level." *Id.* at 1034. The court also distinguished *Goodell* on the ground that *Goodell* was a decision on the merits, whereas the plaintiff in *Edwards* was time-barred, so the

defendant in *Edwards* did not prevail for purposes of awarding fees. *Id.* at 1034 & n. 3. The district court in *Edwards* provided additional reasons for its decision, *id.* at 1034-35, but it did not expressly consider the issue of preemption.

In challenging this fee award, plaintiffs cite to the unpublished district court decision in *Wilson v. Norbreck LLC,* No. CIV S-04-690 DFL JFM, 2007 WL 1063050 (E.D. Cal. Apr. 9, 2007) (unpublished disposition), and it is also consistent with the result we reach regarding preemption. The district court there held that awarding fees to a prevailing defendant under the CDPA, when the defendant would not be entitled to attorney's fees under the ADA, would violate public policy. *Id.* at *3. The *Wilson* court also questioned the availability of fees to a prevailing defendant under state law, noting that in *Gunther v. Lin,* 144 Cal.App.4th 223, 50 Cal.Rptr.3d 317, 332 n. 18 (2006), the California Court of Appeal "left open the issue of whether a prevailing defendant could recover attorney's fees under § 55." 2007 WL 1063050 at *2. The district court in *Wilson* did not rule on this issue, but held that "when a plaintiff brings parallel CDPA and ADA claims, the ADA fees provision controls as a matter of state law" because "[u]nder California law, prevailing defendants cannot receive attorney's fees for defending claims that inextricably overlap with other claims when a fee award is inappropriate for the defense of the latter." *Id.* at *3. The district court cited to *Carver v. Chevron U.S.A., Inc.,* 119 Cal.App.4th 498, 503-04, 14 Cal.Rptr.3d 467 (2004), which held it would violate public policy to award fees to a defendant for defending common-law claims

that overlapped its defense of state antitrust claims, for which fees were available only to plaintiffs and not to defendants.

The federal district courts are thus in disagreement over the proper interpretation of Section 55. For purposes of our decision, it is clear that California has interpreted Section 55 to permit recovery of attorney's fees even where the plaintiff's claim is not deemed to be frivolous. *Molski,* 164 Cal.App.4th at 791, 79 Cal.Rptr.3d 574. We hold that to the extent that Section 55 does authorize the award of fees to a prevailing defendant on nonfrivolous CDPA state claims that parallel nonfrivolous ADA claims, there is a conflict and the ADA preempts Section 55 of the CDPA.

The order awarding attorney's fees is **REVERSED** and the matter **REMANDED** with instructions to vacate the fee award.

APPENDIX B

IN THE SUPREME COURT OF CALIFORNIA

S180890

LES JANKEY, ET AL.,

Plaintiffs and Appellants,

v.

SONG KOO LEE,

Defendant and Respondent.

Filed December 17, 2012

Sued under state and federal law for disability access discrimination, defendant Song Koo Lee prevailed and sought attorney fees. The trial court concluded fees for a prevailing defendant under Civil Code section 55 were mandatory and awarded

$118,458, and the Court of Appeal affirmed.[1] We consider two principal challenges to the award: whether the trial court erred in determining that section 55 fees are mandatory, and whether an award of mandatory fees is preempted by the federal Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.; ADA). We conclude the plain language of section 55 makes an award of fees to any prevailing party mandatory, and the ADA does not preempt this part of the state's attorney fee scheme for disability access suits. Accordingly, we affirm the judgment of the Court of Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Lee owns and operates the K&D Market, a small grocery store in San Francisco's Mission District. He does not own the building but has operated the market since 1985.

Plaintiff Les Jankey, a wheelchair user, sued Lee for denying him and other similarly situated disabled persons access to the full and equal enjoyment of the goods and services offered by K&D Market.[2] Jankey contended a four-inch step located at the entry of the market was an architectural barrier that prevented him and other wheelchair-bound individuals from wheeling into the store. Jankey asserted violations

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[1] All further unlabeled statutory references are to the Civil Code.

[2] Jankey was originally joined by a second plaintiff, a nonprofit disability rights organization, but the trial court concluded it lacked standing and the organization plays no role in this appeal.

of the federal ADA, the Unruh Civil Rights Act (§ 51 et seq.), the Disabled Persons Act (§ 54 et seq.),[3] and Health and Safety Code section 19955 et seq. Among other relief, Jankey sought an injunction under state and federal law compelling Lee to make K&D Market readily accessible to individuals with disabilities. (See § 55; 42 U.S.C. § 12188(a)(2).)

The trial court granted Lee summary judgment. That K&D Market had a threshold step was undisputed, but Lee conclusively established as an affirmative defense that removal of the barrier was not readily achievable and he thus was entitled to judgment on all four disability access claims. (See *Munson v. Del Taco, Inc., supra*, 46 Cal.4th at p. 669 & fn. 6; *Colorado Cross Disability v. Hermanson Family* (10th Cir. 2001) 264 F.3d 999, 1002-1003; 42 U.S.C. § 12182(b)(2)(A)(iv).)

Lee moved for an award of attorney fees under section 55, which provides for prevailing party fees in actions to enjoin disability access violations. Opposing the motion, Jankey argued that section 55 was preempted by the ADA. (See *Hubbard v. SoBreck, LLC* (9th Cir. 2009) 554 F.3d 742, 745.) In the alternative, Jankey contended an award could be made only upon a finding that the complaint was "frivolous, unreasonable, or groundless."[4]

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[3] "Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the 'Disabled Persons Act,' although it has no official title." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674, fn. 8.)

[4] Consistent with common practice, we use "frivolous" as shorthand for this formulation.

(*Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 422.) Without directly addressing preemption, the trial court concluded Lee was entitled to a mandatory fee award under *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786.[5] The court awarded Lee $118,458 in fees, most of the approximately $130,000 originally sought.

While not contesting the summary judgment, Jankey appealed the trial court's award of attorney fees. The Court of Appeal affirmed. It "respectfully disagree[d] with the *Hubbard [v. SoBreck, LLC, supra*, 554 F.3d 742] court's preemption analysis," concluding a mandatory fee award was both required by state law and permitted by federal law. It upheld the trial court's fee award in its entirety.

We granted review to address the conflict between the Ninth Circuit's opinion in *Hubbard v. SoBreck, LLC, supra*, 554 F.3d 742, finding preemption, and the Court of Appeal's decision, finding none.

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[5] Accordingly, the trial court made no finding as to whether Jankey's claims could be characterized as frivolous.

DISCUSSION

I. Federal and State Disability Access Remedies

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

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.) Businesses must "'remove architectural barriers … in existing facilities … where such removal is readily achievable.'" (*Munson v. Del Taco, Inc., supra*, 46 Cal.4th at p. 669, quoting 42 U.S.C. § 12182(b)(2)(A)(iv).) Liability does not depend on proof of intentional discrimination, but a private litigant cannot obtain damages for the denial of access, only injunctive relief. (*Munson*, at pp. 669-670; 42 U.S.C. § 12188(a).)

In 1992, shortly after passage of the ADA, the Legislature amended the state's disability protections "'to strengthen California law in areas where it is weaker than the [ADA] and to retain California law when it provides more protection for individuals with disabilities than the [ADA].'" (*Munson v. Del Taco, Inc., supra*, 46 Cal.4th at p. 669, quoting Stats. 1992, ch. 913, § 1, p. 4282.) Two overlapping laws, the Unruh Civil Rights Act (§ 51) and the Disabled Persons Act (§§ 54-55.3), are the principal sources of state disability access protection.

The Unruh Civil Rights Act broadly outlaws arbitrary discrimination in public accommodations and includes disability as one among many prohibited bases. (§ 51, subd. (b).) As part of the 1992 reformation of state disability law, the Legislature amended the Unruh Civil Rights Act to incorporate by reference the ADA, making violations of the ADA per se violations of the Unruh Civil Rights Act. (§ 51, subd. (f); *Munson v. Del Taco, Inc., supra*, 46 Cal.4th at pp. 668-669.) This amendment was intended to extend to disabled individuals aggrieved by an ADA violation the full panoply of Unruh Civil Rights Act remedies. (*Munson*, at p. 673.) These include injunctive relief, actual damages (and in some cases as much as treble damages), and a minimum statutory award of $4,000 per violation. (§ 52, subds. (a), (c)(3); *Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1058.)

The Disabled Persons Act substantially overlaps with and complements the Unruh Civil Rights Act. (*Munson v. Del Taco, Inc., supra*, 46 Cal.4th at p. 675.) More narrow in focus than the Unruh Civil Rights Act, it 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*, at p. 674, fn. 8; see §§ 54, subd. (a), 54.1, subd. (a)(1).) As with the Unruh Civil Rights Act, the Legislature amended the Disabled Persons Act to incorporate ADA violations and make them a basis for relief under the act. (§§ 54, subd. (c), 54.1, subd. (d); *Munson*, at p. 674; *Wilson v. Murillo* (2008) 163 Cal.App.4th 1124, 1131.) The available

remedies include actual damages (and in some cases as much as treble damages), with a $1,000 minimum recovery. (§ 54.3, subd. (a); *Molski v. Arciero Wine Group, supra*, 164 Cal.App.4th at p. 792.) Recognizing the overlap between the Unruh Civil Rights Act and the Disabled Persons Act, the Legislature expressly foreclosed double recovery. (§ 54.3, subd. (c); *Munson*, at p. 675.)

Section 55 is part of the Disabled Persons Act, but it offers an independent basis for relief. (*Molski v. Arciero Wine Group, supra*, 164 Cal.App.4th at p. 792.)[6] It is broader in two respects than the private right of action authorized by section 54.3: section 55 extends standing to those "potentially aggrieved," not just those who have been actually denied access, and relief may be predicated on potential violations not only of sections 54 and 54.1 but also of various provisions in both the Government Code and the Health and Safety Code.[7] (§ 55; see *Turner v. Association of American Medical Colleges, supra*, 193 Cal.App.4th at p. 1059; *Molski*, at p. 792.) Section 55 is also narrower than section 54.3 in one significant

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[6] In full, section 55 provides: "Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code, Chapter 7 (commencing with Section 4450) of Division 5 of Title 1 of the Government Code, or Part 5.5 (commencing with Section 19955) of Division 13 of the Health and Safety Code may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees."

[7] Here, Jankey invoked relevant provisions of the Health and Safety Code, seeking injunctive relief for violations of Health and Safety Code section 19955 et seq.

respect: it authorizes only injunctive relief, not damages. (*Molski*, at p. 792.)

II. Section 55 Mandates Attorney Fees for Every Prevailing Party

Here, Jankey sued (and lost) under each of the principal federal and state disability access laws—the ADA, the Unruh Civil Rights Act, and sections 54.3 and 55 of the Disabled Persons Act. Section 55, on which Lee predicated his fee request, is unique among these sources of law in containing a broadly worded two-way fee-shifting clause: "The prevailing party in the action" under section 55 "shall be entitled to recover reasonable attorney's fees." Before considering the interplay between this provision and the narrower fee provision of the ADA, we address, and reject, Jankey's challenge to the lower courts' conclusion that section 55 grants a prevailing defendant a mandatory right to fees.

Two aspects of the plain language of section 55 are dispositive. First, the statute was written to allow fees for a "prevailing party," not just a prevailing plaintiff. The Legislature knows how to write both unilateral fee statutes, which afford fees to either plaintiffs or defendants, and bilateral fee statutes, which may afford fees to both plaintiffs and defendants. "When the Legislature intends that the successful side shall recover its attorney's fees no matter who brought the legal proceeding, it typically uses the term 'prevailing party.'" (*Stirling v. Agricultural Labor Relations Bd.* (1987) 189 Cal.App.3d 1305, 1311; see also *Molski v. Arciero Wine Group, supra*, 164 Cal.App.4th at p. 790; cf. §§

52.1, subd. (h) [attorney fees only for "petitioner or plaintiff"], 54.3, subd. (a) ["Any person" who violates specified statutes "is liable for ... attorney's fees as may be determined by the court"].) The Legislature chose in section 55 to enact a bilateral fee statute, granting defendants as well as plaintiffs the opportunity for a fee award.

Second, while the determination that a defendant is a prevailing party is generally discretionary (see *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332), once a trial court determines that a defendant qualifies, the language of section 55 mandates a fee award: a prevailing party "shall be entitled" to reasonable fees. Here as well, the Legislature has routinely and clearly differentiated, using "may" in circumstances where it intends a fee award to be discretionary and "shall" in circumstances where it intends an award to be mandatory. (Compare, e.g., §§ 52.1, subd. (h) ["the court may award the petitioner or plaintiff reasonable attorney's fees"], 3426.4 ["the court may award reasonable attorney's fees"] with §§ 1785.31, subd. (d) ["prevailing plaintiffs ... shall be entitled to recover ... reasonable attorney's fees"], 3344, subd. (a) [prevailing party "shall ... be entitled to attorney's fees"].)

Consistent with the plain language of section 55, every reported case to consider the question has concluded, as we do, that an award of fees to a prevailing defendant is mandatory. (*Molski v. Arciero Wine Group, supra*, 164 Cal.App.4th at pp. 790-792; *Jones v. Wild Oats Markets, Inc.* (S.D. Cal. 2006) 467 F.Supp.2d 1004, 1011-1012; *Goodell v.*

Ralphs Grocery Co. (E.D. Cal. 2002) 207 F.Supp.2d 1124, 1126-1127.)

Against the text of the statute and precedent, Jankey argues the legislative history behind section 55 shows the Legislature intended to afford only prevailing plaintiffs mandatory fees. Section 55 was enacted by Assembly Bill No. 2471 (1973-1974 Reg. Sess.). Jankey selectively cites passages from analyses of this measure that confirm the Legislature's intent to afford prevailing plaintiff's attorney fees, but never demonstrates that the Legislature did not also intend to afford fees to prevailing defendants. Indeed, the history is to the contrary and reveals a conscious choice to ensure prevailing defendants a right to fees. As originally drafted, the new injunctive provision would have granted fees only to prevailing plaintiffs. (Assem. Bill No. 2471 (1973-1974 Reg. Sess.) § 1, as introduced May 15, 1973 ["If successful in obtaining an injunction, the physically disabled person may be awarded reasonable attorney's fees ... ."].) The Legislature specifically amended Assembly Bill No. 2471 to make the fee provision bilateral. (Assem. Bill No. 2471 (1973-1974 Reg. Sess.) § 1, as amended in Sen., Apr. 22, 1974 [substituting "prevailing party" language]; Legis. Counsel's Dig., Assem. Bill No. 2471 (1973-1974 Reg. Sess.) 2 Stats. 1974, Summary Dig., p. 242 [the law "[s]pecifies that prevailing party is entitled to reasonable attorney's fees."].) We would

do violence to the language of the statute were we to disregard that change.[8]

Jankey also argues section 55 is in pari materia with the ADA and other state laws protecting disability access, like the Unruh Civil Rights Act, and its fee provision thus should be interpreted similarly. But statutes on the same subject will be read in a consistent fashion only "to the extent their language permits." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1091.) The text of section 55 marks a clear departure from that of the Unruh Civil Rights Act (§ 52.1, subd. (h) [awarding fees only to a "petitioner or plaintiff"]) and the ADA (42 U.S.C. § 12205 [allowing that a court "in its discretion, may allow" fees]). Its fee provision mandates an award to all prevailing parties, including prevailing defendants.

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[8] Jankey's reliance on the legislative history of a predecessor bill, Assembly Bill No. 1547 (1972 Reg. Sess.) is equally unpersuasive. Like Assembly Bill No. 2471 (1973-1974 Reg. Sess.), Assembly Bill No. 1547 was originally drafted to allow only prevailing plaintiffs attorney fees. (Assem. Bill No. 1547 (1972 Reg. Sess.) § 1, as introduced Mar. 15, 1972.) But unlike Assembly Bill No. 2471, it was never amended to extend fees to prevailing parties and went down to defeat.

III. Section 55 Is Not Preempted

A. The ADA's Fee Regime

We turn to Jankey's principal contention, that the ADA preempts section 55 insofar as the state law affords prevailing defendants a broader entitlement to recovery of attorney fees than would federal law.

In contrast with section 55, the ADA allows defendants fees only for responding to frivolous claims and makes fee recovery discretionary: "In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party ... a reasonable attorney's fee ... ." (42 U.S.C. § 12205.) As the legislative history shows clearly, Congress intended that discretion to be exercised in accord with principles set forth in *Christiansburg Garment Co. v. EEOC, supra*, 434 U.S. 412 (*Christiansburg*). (See H.R. Rep. No. 101-485(II), 2d Sess., p. 140 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 423; H.R. Rep. No. 101-485(III), 2d Sess., p. 73 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 496.) Under Christiansburg, while prevailing plaintiffs should receive fees unless an award would be unjust (*Christiansburg*, at pp. 416-417), prevailing defendants may receive fees only when the trial court finds that a plaintiff's claim is "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so" (id. at p. 422; see, e.g., *Bercovitch v. Baldwin School, Inc.* (1st Cir. 1999) 191 F.3d 8, 11 [holding that fees are available to an ADA defendant only upon a showing of frivolousness]; *Summers v. A.*

Teichert & Son, Inc. (9th Cir. 1997) 127 F.3d 1150, 1154 [same]; *Bruce v. City of Gainesville, Ga.* (11th Cir. 1999) 177 F.3d 949, 951-952 [same]). Jankey contends Congress's adoption of this more stringent federal standard should preempt the award of fees under a lesser state standard for overlapping work done to defend against both state and federal claims.

B. General Preemption Principles

"The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935; see U.S. Const., art. VI, cl. 2; *Arizona v. United States* (2012) 567 U.S. ___, ___ [132 S.Ct. 2492, 2500-2501].) "Congress may exercise that power by enacting an express preemption provision, or courts may infer preemption under one or more of three implied preemption doctrines: conflict, obstacle, or field preemption." (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1059.)

In both express and implied preemption cases, whether preemption will be found in a given case depends foremost on congressional intent. (*Wyeth v. Levine* (2009) 555 U.S. 555, 565; *Brown v. Mortensen, supra*, 51 Cal.4th at pp. 1059-1060.) Significantly, we begin with a presumption against preemption and will override that presumption only when Congress has made "'clear and manifest'" its intent to displace state law with federal law. (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485; accord, *Brown*, at p. 1060.)

As the party asserting preemption, Jankey has the burden of overcoming that presumption and establishing that Congress in fact intended to invalidate a law such as section 55. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra*, 41 Cal.4th at p. 936.)

C. Section 501(b) of the ADA

Here, Congress has spoken to preemption directly: a construction clause in the ADA spells out the act's intended effect on state laws. The clause disavows any broad preemptive intent, instead permitting states to enact and enforce complementary laws: "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) (hereafter sometimes ADA § 501(b)).)

On its face, this clause distinguishes state laws that afford equal or better protection to the disabled than the ADA from those that do not. Laws in the former category are shielded from preemption; nothing in the ADA "shall be construed to invalidate or limit the remedies, rights, and procedures" they provide those with disabilities. (42 U.S.C. § 12201(b).)[9] Laws in the latter category are, by

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[9] See also House of Representatives Reports, report No. 101-485(II), 2d Session, page 135 (1990), reprinted in 1990 United States Code Congressional and Administrative News, page 418 ("Congress does not intend to displace any of the

negative implication, not shielded from preemption. The construction clause, however, does not expressly preempt these less protective laws; it does not categorically declare that any law providing lesser protection than the ADA is invalid. In the absence of either express preemption or a shield against preemption, it follows that such laws are invalid to the extent standard conflict or obstacle preemption principles would require their displacement.[10]

We previously have recognized the congressional "'power to preclude conflict [and obstacle] preemption, allowing states to enforce laws even if those laws are in direct conflict with federal law or frustrate the purpose of federal law.'" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra*, 41 Cal.4th at p. 945, fn. 9; see *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 872 [acknowledging that Congress has the constitutional power to limit implied

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rights or remedies available under other … state laws … which provide greater or equal protection to individuals with disabilities."); House of Representatives Reports, report No. 101-485(III), 2d Session, page 70 (1990), reprinted in 1990 United States Code Congressional and Administrative News, page 493 (same).

[10] In contrast, neither express nor field preemption bears on state laws protecting the rights of individuals with disabilities. ADA section 501's construction clause aside, the ADA contains no express preemption clause. As well, ADA section 501's express preservation of the several states' authority to regulate in the area of disability discrimination negates any argument that Congress intended to occupy the field of disability rights protection.

preemption].) Congress can determine that, so long as a state law affords equal or greater protection than the ADA, it categorically should be treated as not preempted. (See *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F.Supp. 659, 663-664 [ADA § 501(b) is intended to ensure plaintiffs are never denied on preemption grounds the benefits of such compatible state statutes].) Our first task, then, is to determine whether section 55 qualifies as such a law.

Neither the text of the construction clause nor any other language in the ADA addresses how to determine whether a state law affords equal or greater protection than the ADA. Accordingly, we may turn to the legislative history for insight. (E.g., *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 770.) The committee reports explaining the construction clause reveal an intent that a state law should qualify for protection from preemption whenever at a minimum some part of it is superior to the ADA in the protection it affords, such that an individual with a disability might choose to invoke it, even if the law may in other respects provide procedures or remedies that are arguably inferior.

ADA section 501(b) was intended to ensure "all of the rights, remedies and procedures that are available to people with disabilities under ... other state laws (including state common law) are not preempted by this Act." (H.R. Rep. No. 101-485(II), 2d Sess., p. 135 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 418; H.R. Rep. No. 101-485(III), 2d Sess., p. 70 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 493; see Wood v. County of Alameda, supra, 875 F.Supp. at p. 663 [the

purpose of ADA § 501(b) is to "maximize the options available to plaintiffs"].) In lieu of broadly preempting every arguably lesser state remedy, Congress elected to maximize individuals' freedom to select whichever legal remedies they desired: "A plaintiff may choose to pursue claims under a state law that does not confer greater substantive rights, or even confers fewer substantive rights, if the plaintiff's situation is protected under the alternative law and the remedies are greater." (H.R. Rep. No. 101-485(III), 2d Sess., p. 70 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 493.) The House Judiciary Committee gave as one example this state's Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), which at the time unlike the ADA did not protect those with mental disabilities, but did offer superior damages remedies. Such a law should not be construed as conferring lesser rights because of its narrower scope; rather, ADA section 501(b) and the ADA as a whole should be read to preserve individuals' rights to decide whether to sue under the state law as well, or instead. (H.R. Rep. No. 101-485(III), 2d Sess., p. 70 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 493.)

The House Judiciary Committee's report reflects a congressional desire 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 another feature of the state avenue for redress might render it more desirable or beneficial. 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. It follows 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.

Applying this approach to preemption, we think it evident section 55 qualifies as a state law that affords, in at least some respects, greater protection compared to the ADA. Most notably, section 55's standing provision is broader than its federal counterpart. 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 (*Urhausen v. Longs Drug Stores California, Inc.* (2007) 155 Cal.App.4th 254, 266). 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. (42 U.S.C. § 12188(a)(1).) 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." (*McInnis-Misenor v. Maine Medical Center* (1st Cir. 2003) 319 F.3d 63, 69; see also *Chapman v. Pier 1 Imports (U.S.), Inc.* (9th Cir. 2011) 631 F.3d 939, 946 (en banc) [to obtain injunctive relief under the ADA, an access plaintiff "must demonstrate a 'real and immediate threat of repeated injury' in the future"].) Thus, while courts have issued injunctive relief

under state law without requiring proof that a plaintiff intends to encounter or has been deterred from encountering a given architectural barrier,[11] courts interpreting the ADA have generally required more, denying injunctive claims for want of standing in the absence of evidence a plaintiff intends to use a facility or would do so but for the presence of the challenged barrier.[12] Accordingly, an individual with a disability might choose to sue under section 55, in addition to or instead of the ADA, because of this lower standing hurdle. ADA section 501(b) preserves against preemption such a law.[13]

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[11] See *Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 526 (upholding injunctive relief for a plaintiff who never attempted to use a noncompliant wheelchair lift because the plaintiff was still "at least potentially aggrieved"); *Molski v. Arciero Wine Group*, *supra*, 164 Cal.App.4th at page 792 (a § 55 plaintiff "will not be required to prove an actual attempt to access the facility" in order to obtain relief).

[12] See, e.g., *Steger v. Franco, Inc.* (8th Cir. 2000) 228 F.3d 889, 893 (rejecting the standing of access plaintiffs who argued simply that "they are disabled and may enter the building in the future."); *McInnis-Misenor v. Maine Medical Center*, *supra*, 319 F.3d at pages 68-73 (affirming dismissal on standing grounds where a disabled plaintiff could show only that she potentially might encounter architectural barriers in a hospital, not that a denial of access was imminent); Milani, *Wheelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA* (2004) 39 Wake Forest L.Rev. 69, 84-85 and footnote 68 (collecting cases).

[13] Standing is not the only way in which section 55 is broader than the ADA. Section 55 enforces a range of state access requirements above and beyond those contained in the ADA and its enabling regulations. (See § 55; Gov. Code, § 4450 et seq.; Health & Saf. Code, § 19955 et seq.) For purposes of

Notably, it matters not for purposes of ADA preemption that other aspects of section 55, such as the differing attorney fee regime, might be viewed as less advantageous.[14] ADA section 501(b) relieves courts of the need to parse every aspect of a state law to determine whether, on balance, the state law is equally or more advantageous as a whole. Instead, that question is left to individual plaintiffs who may pick and choose the remedies they think worth invoking according to their particular circumstances.

Jankey argues that ADA section 501(b) is an express preemption clause, that it nullifies all state laws less protective of the rights of the disabled than

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preemption, however, we need only identify at least one superior aspect of the state law remedy.

[14] Whether all would-be plaintiffs would in fact view the different state law fee regime as less desirable than the ADA's regime is unclear. Some potential plaintiffs might prefer the state rule, under which every prevailing plaintiff is "entitled" to recover reasonable attorney fees (§ 55), to the federal rule, under which fees can be denied a prevailing plaintiff if "'special circumstances would render such an award unjust'" (*Christiansburg*, *supra*, 434 U.S. at pp. 416-417, quoting *Newman v. Piggie Park Enterprises* (1968) 390 U.S. 400, 402). And some plaintiffs might prefer as well the possibility of recovering fees under a catalyst theory, available under section 55 but not the ADA. (Compare *Mundy v. Neal* (2010) 186 Cal.App.4th 256, 259 [recognizing that under § 55 a plaintiff might recover fees for triggering voluntary changes in a defendant's conduct] with *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* (2001) 532 U.S. 598, 610 [holding that the ADA does not authorize catalyst theory recovery, instead requiring a favorable judgment or consent decree].)

the ADA, and that section 55 is such a law. We are not persuaded. First, as we have discussed, the text of ADA section 501(b) and the legislative history behind it reveal it not as an express preemption clause but as a clause insulating from preemption any state laws offering better protections in some respect. Second, 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 case. This assumption is unfounded. Congress contemplated that state laws would be protected from ADA preemption if in principle they afforded superior protections in some regard. (See H.R. Rep. No. 101-485(III), 2d Sess., p. 70 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 493.) As we have discussed, section 55 does so. Clearly Jankey himself at the time of filing saw some benefit to adding a section 55 claim to his ADA claim or else he would have omitted it. Having invoked section 55, he cannot now be heard to complain that it has brought him only a bill for attorney fees.

D. Hubbard and Conflict Preemption

In a single paragraph, and without addressing the import of ADA section 501(b), the Ninth Circuit reached a contrary conclusion. (*Hubbard v. SoBreck, LLC, supra*, 554 F.3d at p. 745.) Hubbard reasoned that where parallel state and federal claims are filed, such that the work in defending the two claims overlaps, a grant of fees on the state law claim "is necessarily a grant of fees as to the ADA claim." (*Ibid.*) In such circumstances, if state law provides for fees where federal law does not, there is a conflict and the state law must yield. (*Ibid.*; see *PLIVA, Inc. v. Mensing* (2011) 564 U.S. ___, ___ [131 S.Ct. 2567, 2577] ["Where state and federal law 'directly conflict,' state law must give way."])

We disagree with the Ninth Circuit's premise, that fees for defending a state law claim are necessarily fees for ADA work if the claims overlap. 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. The fee award here is not in any meaningful sense for or on account of having to defend against an ADA claim, but instead a consequence of Jankey's purely voluntary decision to seek additional state remedies. State law does not declare ADA fees compensable, only section 55 fees; it does not dictate an outcome at odds with federal law.[15]

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[15] Jankey repeatedly describes section 55 as a law imposing fees "for" a nonfrivolous ADA action. Such a law

Gagliardo v. Connaught Laboratories, Inc. (3d Cir. 2002) 311 F.3d 565 illustrates that an award made under a parallel and overlapping state claim is not perforce an award made under the ADA. There, the plaintiff sued under both the ADA and a "virtually identical" state statute and obtained a $2.5 million judgment, undifferentiated as between the two claims. (*Id.* at p. 570.) The defendant argued on appeal that a federal statute capping damages under the ADA necessarily limited the damages award. (See 42 U.S.C. § 1981a(b)(3).) Drawing on the reasoning of two title VII cases, *Passantino v. Johnson & Johnson Consumer Products* (9th Cir. 2000) 212 F.3d 493 and *Martini v. Fed. Nat. Mortgage Assn.* (D.C. Cir. 1999) 178 F.3d 1336, the Third Circuit disagreed. It explained that a state can authorize liability and damages for the very same acts prohibited by the ADA without any such award constituting an award for ADA violations and violating the ADA ceiling. (*Gagliardo*, at pp. 570-572.) So it is here; an attorney fee award under state law for defending against a nearly identical state law claim does not automatically become an award under the ADA, even if the same work is involved, and thus need not conflict with the ADA's limits on defense attorney fees.

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would be preempted; a state law that provided state court defendants with prevailing party fees for defending against federal ADA access claims under 42 United States Code section 12182 would, in fact, conflict with federal law. But section 55 does no such thing.

The Ninth Circuit's finding of conflict preemption implicitly rests on the view that Congress not only established the rule for awarding attorney fees incurred on account of defending an ADA claim, but also intended to immunize plaintiffs from paying for any of that same work, absent grounds for payment under the ADA, even when it was also necessary to defend against an overlapping state law claim. From the text of the ADA we discern no such intent. Similarly, nothing in the available committee reports discussing the ADA suggests Congress even considered the question. Absent congressional intervention, California has every right to adopt whatever fee regime it deems appropriate upon invocation of state law remedies. It may establish both the costs of and the potential payoffs for seeking a state remedy while leaving undisturbed the corresponding costs and payoffs that flow from invocation of a comparable federal remedy.

Accordingly, we respectfully disagree with the Ninth Circuit's conclusion that conflict preemption forecloses an award of fees for a section 55 claim that overlaps with a nonfrivolous ADA claim.

E. Obstacle Preemption

Jankey argues that application of section 55's fee-shifting provision is preempted because it stands as an obstacle to the purposes and objectives of Congress in limiting the recovery of fees for defending against ADA claims. (See *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372-373; *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra*, 41 Cal.4th at p. 936.) Even if we set aside ADA section 501(b)'s insulation of statutes like section 55 from obstacle preemption, we can identify no way in which the fee award here poses a barrier to congressional objectives.

As Jankey correctly notes, the policy behind the ADA's fee standard is the policy behind the Christiansburg standard for a defendant's recovery of attorney fees. The United States Supreme Court identified a pair of competing considerations underlying its selection of that standard. On the one hand, Congress "wanted to protect defendants from burdensome litigation having no legal or factual basis." (*Christiansburg, supra*, 434 U.S. at p. 420; accord, *Fox v. Vice* (2011) 563 U.S. ___, ___, fn. 3 [131 S.Ct. 2205, 2215, fn. 3].) On the other, "[t]o take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of [civil rights law]." (*Christiansburg*, at p. 422.) Fee awards in cases other than those truly "unreasonable or without foundation ... could discourage all but the

most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." (*Ibid*.) The differentiated approach to fee awards in civil rights cases, with prevailing plaintiffs recouping fees more readily than prevailing defendants, is necessary to "advance[] the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation." (*Roadway Express, Inc. v. Piper* (1980) 447 U.S. 752, 762.)

These policies are not implicated in cases where a plaintiff voluntarily invokes a state law remedy that overlaps with the ADA. The heightened ADA standard for defense fee awards, requiring a showing of frivolousness, is intended to avoid chilling the assertion of ADA claims. But because it is only the invocation of the state law remedy, and not the ADA, that triggers the award of 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. Plaintiffs can always sue under the ADA alone, safe in the knowledge that even if they lose, defense fees will be available only in accordance with Christiansburg. Alternatively, they can add one or more state law remedies if they view the potential benefits as superior to the potential burdens. If instead the risks appear to exceed the potential rewards, they can omit a given state law claim, at no loss to enforcement of their ADA rights. (See *Molski v. Arciero Wine Group, supra*, 164 Cal.App.4th at p. 792; *Goodell v. Ralphs Grocery Co., supra*, 207 F.Supp.2d at p. 1129.) Such a regime is fully consistent with Congress's apparent willingness to allow plaintiffs to freely determine what remedies they pursue. (See H.R. Rep. No. 101-485 (III), 2d

Sess., p. 70 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, p. 493; *Wood v. County of Alameda, supra*, 875 F.Supp. at pp. 663-664.) Congress's concern about not discouraging would-be plaintiffs from availing themselves of the ADA thus offers no reason to preclude states from establishing different fee award regimes for independently established state law remedies.

These conclusions do not shift if, as Jankey urges, we focus solely on the application of section 55 in this case. (See *Crosby v. National Foreign Trade Council, supra*, 530 U.S. at p. 373 [obstacle preemption turns on whether, "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67].) Nothing in the prospect of owing attorney fees under section 55 could have deterred Jankey from invoking his federal ADA rights here. He asserted them, and the trial court concluded they had not been impaired, a conclusion Jankey has not challenged. Nor will the fee award chill Jankey or others from asserting ADA rights in the future. It may inspire reluctance to invoke section 55 rights, but that is a matter for the Legislature to consider; it is no concern of Congress's, and it is no basis for finding preemption.

IV. Fees for Work Overlapping Defense of the ADA Claim Are Not Barred Under State Law

Preemption aside, Jankey and amicus curiae the Impact Fund argue that state law should be read to foreclose fees for overlapping work done to defend against both ADA and section 55 claims. The general rule is that where a non-fee-shifting claim overlaps with a fee-shifting claim, it does not limit fee awards under the fee-shifting claim. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.) An exception may arise where to award fees on the fee-shifting claim would impair legislative policies implicated by the respective claims. (E.g., *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 342-343 ["The issue of the proper amount of fees to be awarded when an attorney's time is attributable to recoverable and nonrecoverable claims depends on the legislative intent and policies underlying the specific fee-shifting scheme at issue."]; *Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 504-506; cf. *Fox v. Vice, supra*, 131 S.Ct. at p. 2215 [under federal law, limiting the amount of fees for overlapping work based on a determination that Congress so intended].) But as discussed in connection with conflict preemption, we have found no indication in the ADA or its legislative history that Congress intended state fees for overlapping state claims to be foreclosed, nor, as discussed in connection with obstacle preemption, are we able to discern any policy that would be impaired. Likewise, we have found nothing in the text or sparse legislative history of section 55 to indicate fee recovery should be

limited as a matter of state law based on overlap with federal remedies. Accordingly, we decline to read state law as limiting an award of section 55 fees on this basis.[16]

DISPOSITION

The Court of Appeal's judgment is affirmed. Lee seeks his costs and attorney fees on appeal. As the prevailing party, he is entitled to costs and, under section 55, to appellate attorney fees as well. (See *Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) On remand, the trial court is to fix the amounts.

WERDEGAR, J.

WE CONCUR:

CANTIL-SAKAUYE, C. J.
KENNARD, J.
BAXTER, J.
CHIN, J.
CORRIGAN, J.
LIU, J.

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[16] Jankey and amicus curiae the Impact Fund also argue that section 55 does not authorize fees for work overlapping with Unruh Civil Rights Act and section 54.3 defense. (See *Turner v. Association of American Medical Colleges*, *supra*, 193 Cal.App.4th at p. 1054.) Jankey did not raise the issue in the trial court, the Court of Appeal, or the petition for review. Because the issue is thus waived, we do not consider it.