Case No.: S213100

In The Supreme Court of the State of California

LORING WINN WILLIAMS

Plaintiff and Appellant,

vs.

CHINO VALLEY INDEPENDENT FIRE DISTRICT

Defendant and Respondent.

Court Of Appeal, Fourth Appellate District, Case No. E055755
San Bernardino County Superior Court Case No. CIVRS801732
The Honorable Janet M. Frangie

RESPONDENT'S BRIEF ON THE MERITS

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ISSUE ON WHICH REVIEW HAS BEEN GRANTED

Is a prevailing defendant in an action brought pursuant to the California Fair Employment and Housing Act (Gov. Code, §§ 12900 et seq.) ("FEHA") required to show that a claim was frivolous, unreasonable, or groundless, in order to recover ordinary litigation costs?

I. INTRODUCTION

When the plain language of a statute, this Court's directly applicable precedent, and five decisions from four different appellate districts, all require the same result, that conclusion is spot-on. This is true in our case. All the language, spoken in the clear words of the statute, the decisions of this Court, and the decisions of multiple appellate districts, require that a prevailing defendant in a FEHA action, be awarded ordinary costs, as a matter of right. This unavoidable conclusion cannot be altered based on public policy considerations, or favoring one public policy over another. The Legislature, through the statutes it enacts, sets forth the defining statements of public policy. Legislative expression of public policy cannot be cast aside or replaced through judicial decisions.

The right of civil litigants to recover costs is determined solely by statute. Code of Civil Procedure sections 1032 and 1033.5 set forth the rules on costs awards. Section 1032 entitles a prevailing party in any action to recover costs, as a matter of right. It allows exceptions, but only where expressly provided by statute. Section 1033.5, as it states, defines the costs

a prevailing party is entitled to under Section 1032; it (1) lists cost items which are allowed, unless otherwise expressly stated by statute; (2) lists cost items which are not allowed, except when expressly authorized by law; and (3) states if a cost item is not mentioned in Section 1033.5, it may be allowed or denied in the court's discretion. This allows the Legislature, when enacting statutes governing specific substantive areas, to make express exceptions to a prevailing party's right to ordinary costs allowed as a matter of law, to entitle a prevailing party to costs not otherwise allowed, or to allow or deny costs not expressly allowed or disallowed.

Government Code section 12965(b) is the provision in FEHA on costs, attorney's fees, and expert witness fees. As this Court held, in *Davis v. KGO-T.V.*, Inc. (1998) 17 Cal.4th 436, Section 12965(b) is perfectly harmonized with Sections 1032 and 1033.5; Section 12965(b) (1) provides the express statutory authority necessary for an award of attorney's fees and expert witness fees and (2) provides discretion for the court to award costs neither allowed or disallowed in Section 1033.5. Section 12965(b) does not disturb a prevailing party's entitlement, as a matter of right, to an award of the allowed ordinary costs listed in Section 1033.5, because it does not state an express exception to that right, which is the only way a prevailing party in any action can be deprived costs allowed as a matter of right.

No matter how many times Williams claims otherwise, the clear words of the statutes do not treat costs and attorney's fees in a "parallel" manner. They treat them distinctly differently; Section 1033.5 allows ordinary costs as a matter of right, but only allows attorney's fees, if authorized by contract, statute, or law. And, lest there be any doubt from the clear-cut words of the statutes, in *Davis, supra*, 17 Cal.4th at 441, this Court confirmed the costs in Section 12965(b) are defined by Section 1032 and 1033.5, the statutes that expressly treat ordinary costs and attorney's fees differently.

Given the crystal clear language of Sections 1032 and 1033.5, it is no surprise that five appellate courts considering the issue over a ten year span, have held the statutes mean what they say. Five appellate courts have rejected the result Williams presses for here, to defy Sections 1032 and 1033.5 by creating an exception to a prevailing FEHA defendant's right to recover allowed costs, although no exception is expressly stated in Section 12965(b) or elsewhere. Each of the five appellate courts have rejected Williams' argument that prevailing FEHA defendants should not be awarded costs as a matter of right, but only when they meet a higher standard not expressed in the statute and show the FEHA action was frivolous, unreasonable, or groundless. Remarkably, *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* (1978) 434 U.S. 412, the case that articulated this standard, only applied it to attorney's

fees awards to a prevailing defendant in an employment discrimination case, not to a prevailing defendant costs award. Yet, Williams urges that *Christiansburg* be relied on for a proposition it did not state, that prevailing defendants in employment discrimination lawsuits, are not entitled to costs as a matter of right, but only where the lawsuit was frivolous, unreasonable, or groundless. That too was the mistake of the lone appellate court that preceded the decision of the five other courts by several years, and with no analysis, or even any consideration of Sections 1032 or 1033.5, mistakenly bundled costs and attorney's fees together, holding *Christiansburg* applies to both.

The plain language of the statutes, this Court's directly applicable precedent, and the decisions of five different appellate districts, must not be surrendered to a public policy argument that is not even supported by *Christiansburg,* the very case on which this argument is premised. FEHA is not alone. There are other important consumer and civil rights statutes, where the Legislature has not seen fit to cut off the rights of prevailing defendants to recover ordinary costs.

For all of these reasons, and as more fully articulated below, the Chino Valley Independent Fire District respectfully requests this Court affirm the Court of Appeal's decision and hold that a prevailing FEHA defendant is entitled to an award of ordinary costs as a matter of right and the costs award is not subject to an exception not expressly stated in any

statute, namely, proof that the action was frivolous, unreasonable, or groundless.

II. STATEMENT OF FACTS/PROCEDURAL HISTORY

Williams sued the District for employment discrimination under FEHA. (Clerk's Transcript [CT], 29-35.) The trial court partially granted Williams' motion for summary adjudication and denied the District's motion for summary judgment. (CT, 222). The District filed a petition for peremptory writ of mandate in the Court of Appeal, Fourth Appellate District. (CT, 222.) The Court of Appeal granted the petition. (CT, 222). This Court denied Williams' petition for review. (CT, 222). The trial court vacated its earlier orders, entered an order granting the District's summary judgment motion, and entered judgment in favor of the District, with costs to be determined. (CT, 222).

The District filed two memoranda of costs, one for costs incurred in the trial court in the amount of $ 9,953.78 and one for costs incurred in the Court of Appeal in the amount of $2,526.92, for a total amount of $12,480.07. (CT, 220-225 & 258-264). Williams filed two motions to tax costs, which were heard and granted and denied, in part. (CT, 95-98 & 145-152.) The trial court exercised its discretion to cut the costs by $7,111.82, more than half the total costs award, and reduced the costs from $12,480.07 to $5,368.88. (CT, 350-351.)

Williams appealed the costs award. (CT, 369-370.) In a published opinion filed on July 23, 2013, the Court of Appeal, Fourth District, Division Two, affirmed the trial court's award of costs, holding the District should be granted the ordinary costs claimed in its costs memorandum, as modified by the trial court, without a showing that Williams' FEHA action was frivolous, unreasonable, or groundless. (*Williams v. Chino Valley Independent Fire Dist.* (2013) 218 Cal.App.4th 73.) The Fourth Appellate District concluded, among other things, that Government Code section 12965(b), the provision in FEHA under which the court may award reasonable attorney's fees and costs to a prevailing party, does not state an exception to the general rule of Code of Civil Procedure section 1032, entitling a prevailing party to costs, as a matter of right. This petition followed.

III. ARGUMENT

A. SETTLED RULES OF STATUTORY CONSTRUCTION MANDATE THAT A PREVAILING FEHA DEFENDANT IS ENTITLED TO ORDINARY COSTS AS A MATTER OF RIGHT

1. The Statutory Scheme

The right to recover costs is determined solely by statute. (*Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, 439; *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 732.) Section 12965, the provision in FEHA that allows civil actions, includes subdivision (b), authorizing an award of costs to the

prevailing party. As commonly seen in statutes where both costs and attorney's fees are authorized,[1] they are addressed in the same subdivision and subdivision (b) also authorizes an award of attorney's fees to the prevailing party.

Since first enacted in 1980, Section 12965 has been amended fourteen times.[2] Subdivision (b) has been amended three times. Subdivision (b) originally stated and has been amended as follows:

Citation	Original & Amended Language
Added by Stats.1980, c. 992, § 4	**1980 Original language:** "In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs except where such action is filed by

[1] See e.g., Gov. Code, section 9078 [court shall award "costs and reasonable attorney fees" to prevailing plaintiff in action under Gov. Code, § 9077], and section 9079 [Court shall award "costs and reasonable attorney fees" to the public entity if plaintiff's case is clearly frivolous].

[2] Added by Stats.1980, c. 992, § 4. Amended by Stats.1980, c. 1023, § 9; Stats.1984, c. 217, § 1; Stats.1984, c. 420, § 1.5; Stats.1992, c. 911 (A.B.311), § 5; Stats.1992, c. 912 (A.B.1286), § 7.1; Stats.1998, c. 931 (S.B.2139), § 183, eff. Sept. 28, 1998; Stats.1999, c. 591 (A.B.1670), § 12; Stats.2000, c. 189 (A.B.2062), § 1; Stats.2001, c. 813 (A.B.276), § 1; Stats.2002, c. 664 (A.B.3034), § 94.5; Stats.2002, c. 294 (A.B.1146), § 1; Stats.2003, c. 62 (S.B.600), § 118; Stats.2007, c. 43 (S.B.649), § 16; Stats.2012, c. 46 (S.B.1038), § 45, eff. June 27, 2012, operative Jan. 1, 2013.

	a public agency or a public official, acting in an official capacity."
Stats.1998, c. 931 (S.B.2139), § 183, eff. Sept. 28, 1998	**1998 Amended Language** "In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorneys' fees and costs, including expert witness fees, except where such action is filed by a public agency or a public official, acting in an official capacity."
Stats.1999, c. 591 (A.B.1670), § 12	**1999 Amended Language** "In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorneys' fees and costs, including expert witness fees, except where the action is filed by a public agency or a public official, acting in an official capacity."

Stats.2012, c. 46 (S.B.1038), § 45, eff. June 27, 2012, operative Jan. 1, 2013.	**2012 Amended Language** "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees."

Section 12965(b) does not define "costs." Both before and after the enactment of Section 12965(b), "costs" have been defined, first by case law, and then by statute. (*Davis*, *supra*, 17 Cal.4th at 439.) Prior to the enactment of Section 12965(b), case law held "costs" to mean "'those fees and charges which are required by law to be paid to the courts, or some of their officers' [17 Cal.4th 440] or an amount which is expressly fixed by law as recoverable as costs." (*Id.* at 439-440.)

Subsequent to enactment of Section 12965, the Legislature enacted Code of Civil Procedure section 1032, the principal statute governing the right of a prevailing party to recover costs. (Added by Stats.1986, c. 377, § 6; *Davis*, *supra*, 17 Cal.4th at 441.) Section 1032 states:

> Except as otherwise ***expressly*** provided by statute, a prevailing party is entitled ***as a matter of right*** to recover costs in ***any*** action or proceeding.

(Emphasis added.) At the same time Section 1032 was enacted, the Legislature enacted Code of Civil Procedure section 1033.5, which lists the items allowable as costs under Section 1032 and expressly states: "The following items are allowable as costs ***under Section 1032***." (*Davis, supra*, 17 Cal.4th at 441, emphasis added.) Section 1033.5 divides "costs" into three separate categories: (1) costs which are "allowable" (Civ. Code, § 1033.5, subd. (a)); (2) costs which are "not allowable . . . , except when expressly authorized by law" (*Id.*, subd. (b)), and (3) costs which may be allowed or denied in the court's discretion (*Id.*, subd. (c)). In *Davis*, another FEHA costs case, this Court recognized[3] that costs are divided into three separate categories, explaining: "[I]tems of costs have been recognized as allowable, certain items of costs, including the fees of experts not ordered by the court, have been recognized as non-allowable except when expressly authorized by law, and other items of costs have been recognized as allowable in the court's discretion." (*Davis, supra*, 17 Cal.4th at 439.)

The purpose of Section 1033.5 "was to codify *existing* law at the time of its enactment, not to permit courts to craft new decisional law concerning what are allowable items of costs." (*Davis, supra*, 17 Cal.4th

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[3] And, as discussed in Section III(B)(1) found this significant to its decision. (*Davis, supra*, 17 Cal.4th at 439.)

at 444.) The Assembly Judiciary Committee also explained: "Section 1033.5 was intended not to alter existing law but, instead, to eliminate confusion by specifying for general purposes 'which costs are and which costs are not allowable.'" (*Id.* at 441; quoting Assem. Jud. Com., 3d reading analysis of Sen. Bill No. 654 (1985-1986 Reg. Sess.) Apr. 17, 1986, p. 1.) The lists of allowable and non-allowable costs included in the statute "are essentially restatements of existing law, and to a large extent are codifications of case law." (*Davis, supra*, 17 Cal.4th at 441.) *Davis* explained the California Judges Association's intent regarding Section 1033.5:

> The California Judges Association (CJA), which is the source of this bill, states that the existing law, rules and procedures relating to the awarding of litigation costs are hard to find and hard to follow. This bill is intended to rectify that situation by enacting comprehensive statutory lists of which costs are and are not allowable so that litigants and judges will no longer have to search through myriad statutes, cases and treatises in order to determine whether a particular cost item is allowable. CJA states that the list is not intended to substantively change existing law but rather to, as nearly as possible, merely restate it in a central statutory location.

(*Davis*, *supra*, 17 Cal.4th at 442.)

It is clear that since Section 12965(b) was first enacted, the "costs" to be awarded to a prevailing party in civil actions have been defined and are now codified at Sections 1032 and 1033.5.

2. Sections 1032 And 1033.5 Define The Costs A Prevailing FEHA Defendant Is Entitled To Under Section 12965(b)

a. Sections 1032 And 1033.5 Apply To "Any" Action, Which Includes FEHA Actions

In construing a statute, courts first examine the words themselves, as they are the most reliable indicator of Legislative intent. (*Chavez v City of Los Angeles* (2010) 47 Cal.3d 970, 986.) It is a fundamental canon of statutory interpretation that courts are required to accept the plain meaning of a statute absent ambiguity in the text. (*Barnhart v. Sigmon Coal Co.* (2002) 534 U.S. 438, 461-462.) "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (*Id.*, quoting *Conn. Nat'l Bank v. Germain* (1992) 503 U.S. 249, 254.)

The plain language of Section 1032 states it applies to "***any***" action. (Emphasis added.) The word ***any*** is not steeped in ambiguity. The definition of "any" includes "every" and "all." (Random House College Dict. (rev. ed. 1982) p.61.)

The language in Section 1033.5 is also not steeped in ambiguity. Section 1033.5 expressly refers to Section 1032, stating: "The following items are allowable as costs under Section 1032" and then identifies the costs allowable or not allowable to ***any*** prevailing party under Section 1032. Not only is the language itself clear, so it the Legislative intent. As

previously acknowledged by this Court, application of Sections 1032 and 1033.5 to "***any***" action or proceeding, is consistent with the entire purpose for enacting these sections, to have a comprehensive statutory list applicable to any litigation so that litigants and judges will not have to search through countless statutes, cases, and treatises to determine which costs are or are not allowable. (*Davis, supra*, 17 Cal.4th at 442.)

FEHA, including Section 12965(b) existed at the time Sections 1032 and 1033.5 were enacted and expressly stated to apply to ***any*** actions. It is presumed the Legislature is aware of prior statutes it has enacted. (*Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32.) If the Legislature wanted to except Section 12965(b) from its global application of Section 1032 and 1033.5 to ***any*** action, it could have, but did not.

b. Exceptions From The Mandates of Sections 1032 And 1033.5 Must Be Express

This Court has already confirmed what Section 1032 plainly states, that any exemption to Section 1032, must be ***express.*** (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 999.) As *Murillo* states, "[W]hen the Legislature intends to restrict the recovery of costs to just one side of a lawsuit, it knows how to express such restriction." Consistent with this, the Legislature repeatedly invokes the ability under Section 1033.5 to make express statutory exceptions to the requirement that a specified type of cost be allowed under subdivision (a) or is disallowed

under subdivision (b). This includes statutes stating a prevailing defendant is not entitled to costs as a matter of right as stated in Section 1032, but that to obtain costs, the prevailing defendant must satisfy a separate standard. (See e.g. Labor Code § 2673.1 ["the court may order the employee to pay the reasonable attorney's fees and costs of the contractor employer or guarantor only if the court determines that the employee acted in bad faith in bringing the claim]; Prob. Code, § 2622.5 [prevailing party entitled to costs and reasonable attorney fees if objections (or opposition to objections) to conservatorship accounting were "without reasonable cause and in bad faith"]; Gov. Code, §§ 9078, 9079 [court shall award costs and attorney fees to prevailing plaintiff in action under Gov. Code, § 9077, but not to prevailing defendant public agency unless "plaintiff's case is clearly frivolous"]; Gov. Code, § 11130.5 [court shall award costs and attorney fees to prevailing plaintiff in action under Gov. Code, § 11130, but not to prevailing defendant state body unless plaintiff's "action was clearly frivolous and totally lacking in merit"]). Other statutes state a prevailing party is not entitled to costs otherwise allowed under Section 1033.5(a) at all (regardless of whether a higher standard can be met); (*See e.*g. Pub. Contract Code, § 10421 [the state, or person acting on the state's behalf, may sue and, if successful, collect costs and attorney fees; contracting entity not entitled to recover costs or attorney's fees.]) These statutes all include express exceptions to Section 1032(a).

There are also statutes stating a prevailing party is entitled to costs otherwise disallowed under Section 1033.5(b). (See e.g. Section 12965(b) [prevailing party is entitled to expert witness fees (disallowed under Section 1033.5(b)(1) and Code of Civil Procedure section 998 allowing expert witness fees under certain circumstances.)])

Other statutes expressly state if they are withholding or augmenting the costs allowable under Section 1032 (and 1033.5 which lists those costs) such as Section 998, which states: "The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section." Section 998 alters the rights of parties under Sections 1032 and 1033.5 in several ways. For example, when a prevailing plaintiff obtains an award less than an offer to compromise, the costs payments are reversed and the plaintiff, although the prevailing party, is not entitled to costs from the time of the offer and must pay defendant's post-offer costs even though the defendant is not the prevailing party.

Clearly, the Legislature knows how to state exceptions to the costs provisions in Sections 1032 and 1033.5 when it intends to. The sole exception in 12965(b) to the regular rules for costs under Section 1033.5 is express statutory authorization for expert witness fees. The fact that the Legislature made one exception to authorize expert witness fees, which are disallowed unless "expressly authorized by law" (Section 1033.5(b)(1)) confirms the Legislature understands Section 1033.5 defines the costs

awarded to a prevailing party under FEHA and chose not to make any other exceptions to Section 1033.5. As no other exception is made, there is no authority to depart from the prevailing party's entitlement to recover ordinary allowable costs under Section 1032, as "a matter of right."

This Court's analysis and ruling on costs awards in *Murillo* directly apply here. In *Murillo*, the plaintiff challenged a costs award to the prevailing defendant in a Song-Beverly Consumer Warranty Act[4] lawsuit, arguing Section 1032 conflicted with the Song-Beverly Act. The plaintiff argued a prevailing defendant could not obtain a costs award under Section 1032 because the Song-Beverly Act expressly allows a prevailing plaintiff to recover both costs and attorneys' fees, but makes no mention of a prevailing defendant. This Court rejected that argument because it directly conflicts with the express language of Section 1032(b): "Except as otherwise expressly provided by statute, a prevailing party is entitled **as a *matter of right*** to recover costs in any action or proceeding." (Emphasis added.) While the Song-Beverly Act stated only that a prevailing plaintiff could recover costs and attorney's fees,[5] it did not ***expressly*** disallow a

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[4] Contained in Civil Code section 1790 et seq. "Song-Beverly Act."

[5] The provision set forth at Civil Code section 1794(d) states: "If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate of the amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action."

prevailing defendant from also recovering costs. Therefore, the Court found:

> Because section 1032(b) grants a prevailing party the right to recover costs *"[e]xcept as otherwise expressly provided by statute"* (italics added), we must first determine whether Civil Code section 1794(d) provides an "express" exception. Although Civil Code section 1794(d) gives a prevailing buyer the right to recover "costs and expenses, including attorney's fees," the statute makes no mention of prevailing sellers. In other words, it does not expressly disallow recovery of costs by prevailing sellers; any suggestion that prevailing sellers are prohibited from recovering their costs is at most *implied.* Accordingly, based on the plain meaning of the words of the statutes in question, we conclude Civil Code section 1794(d) does not provide an "express" exception to the general rule permitting a seller, as a prevailing party, to recover its costs under section 1032(b).

Murillo reinforces what Section 1032 already states, that any exception to Section 1032, must be ***express.***

c. There Is No Express Exception In Section 12965(b) From The Mandates Of Ordinary Costs In Sections 1032 And 1033.5

The same conclusion in *Murillo,* that there is no exception to the Section 1032 costs provisions, is true here, as applied to Section 12965(b). Section 12965(b) states: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness

fees." There is nothing in this language that provides an express exception to the rule in Section 1032 that the prevailing party is entitled to an award of ordinary costs as a matter of right or that a prevailing defendant is only entitled to recover costs if the *Christiansburg* standard applies.[6] The statement in Section 12965(b) that costs may be awarded to the prevailing party is entirely consistent with Sections 1032 and 1033.5.

The one exception on costs in FEHA cases specified in Section 12965(b), that the prevailing party is entitled to expert witness fees which are disallowed unless "expressly authorized by law" (Section 1033.5(b)(1)), confirms that the Legislature understands express exceptions are necessary to alter costs items allowed or disallowed in FEHA cases and chose not to make any other exceptions. According to the clear words of Section 1032 and this Court's holding in *Murillo*, absent an ***express*** statutory exception, the District's rights to obtain costs under Sections 1032 and 1033.5, may not be altered.

d. Sections 1032 and 1033.5 Are Harmonious With Section 12965(b)

The words of a statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*Dyna-Med, Inc. v. Fair Employment & Hous. Com.*

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[6] *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n* (1978) 434 U.S. 412, 418-419, is discussed in Section IIIC(1).

(1987) 43 Cal.3d 1379, 1387.) Therefore, this Court explained: "When construing the interaction of two potentially conflicting statutes, we strive to effectuate the purpose of each by harmonizing them, if possible, in a way that allows both to be given effect." (*Chavez, supra*, 47 Cal.4th at 986.)

It is a well-settled principle that legislative enactments that are in general and comprehensive terms, apply to all persons, subjects and business within their general purview and scope. (*Lockhart v. Wolden* (1941) 17 Cal.2d 628, 630.) Here, Section 1032 expressly states it applies to "any" action. The rule of statutory construction that a specific statute controls over a general statute applies only when the two statutes conflict. (Code Civ. Proc., § 1859; *People v. Gilbert* (1969) 1 Cal.3d 475, 479.) Sections 1032 and 1033.5 are completely harmonious with Section 12965(b). As this Court has already recognized, Section 1033.5 explains which costs are and are not allowable and explains, rather than contradicts, Section 12965. (*Davis, supra*, 17 Cal.4th at 446.)

That Section 1033.5 explains, rather than contradicts Section 12965(b) is apparent from the plain language of both statutes. Section 12965(b) entitles a prevailing party to costs. It does not define "costs" or otherwise specify which costs are recoverable. Sections 1032 and 1033.5, the statutes of general application, entitling a prevailing party to costs and defining those costs, in any type of action, are compatible and easily harmonized with Section 12965(b) stating a prevailing party's entitlement

to costs in a FEHA action. Section 1033.5 specifies the items that are "allowable as costs under Section 1032." Without Section 1033.5, which is premised on Section 1032, there would be no method for the courts to determine which costs are allowable to the prevailing party under Section 12965(b), and which are (1) allowable; (2) not allowable, except as expressly authorized by law; or (3) allowable in the court's discretion.

Sections 1032 and 1033.5 are not only compatible with Section 12965(b), but are necessarily compatible with all statutes in individual substantive areas that address costs. This is because Section 1032 expressly states costs allowed (in Section 1033.5(a)) are a matter of right "except as otherwise expressly provided by statute" and the costs not allowable (in Section 1033.5(b)) are permitted "when expressly authorized by law." This grants the Legislature the ability and flexibility to provide, in any particular statutory scheme, that a prevailing party in general, or more specifically, a prevailing defendant or prevailing plaintiff, is not entitled to costs as set forth in Sections 1032 and 1033.5(a) or is entitled to one or more costs expressly disallowed in Section 1033.5(b).

Section 1033.5 is also harmonious with the court's right to exercise its discretion when awarding costs under Section 12965(b). Section 1033.5 entitles courts to exercise their discretion in three key ways:

- Section 1033.5(c)(2) requires that allowed costs be reasonably necessary to the litigation;

- Section 1033.5(c)(3) requires that costs be reasonable in amount;
- Section 1033.5(c)(4) allows courts to exercise their discretion in a third way, stating costs not mentioned in Section 1033.5 may be allowed or denied in the court's discretion.

In exercising its discretion on the reasonableness of costs and whether to allow costs not expressly allowed or disallowed, the Court may consider the policies and objectives of FEHA. (*Chavez, supra*, 47 Cal.4th at 986.) Plainly, Section 1033.5 enables courts to exercise their discretion under Section 12965(b) when awarding costs in FEHA cases, by assessing the reasonableness of costs and to award or deny costs that are not mentioned in Section 1033.5 and are therefore, not expressly allowed or disallowed. This is exactly what the trial court did in this case when it reduced the costs of $12,480.07 sought in the memorandum of costs by $7,111.82, which is more than half the amount of costs incurred, for a total award of $5,368.88. (CT, 76 & 99).

e. Costs and Fees Are Not Treated Parallel Under The Applicable Statutes.

The argument that costs and fees are treated parallel is a false one. The premise of the argument is that the applicable statutes treat an award of costs the same as an award of attorney's fees. The clear language of the applicable statutes do no such thing. The statutes treat ordinary costs and attorney's fees distinctly different.

The parallel treatment argument is based on four words in this sentence contained in Section 12965(b): "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable ***attorney's fees and costs***, including expert witness fees." (Emphasis added.) But, this language, "attorney's fees and costs," does not treat attorney's fees and costs the same. It does not "treat" them in any way at all, other than to state the prevailing party may be awarded attorney's fees and costs. More precisely, Section 12965 is ***silent*** on anything other than the simple fact that the prevailing party is entitled to attorney's fees and costs. This is because, as this Court and multiple courts of appeal, have repeatedly recognized, the award of costs under Section 12965(b) is defined by Sections 1032 and 1033.5. (*Davis, supra*, 17 Cal.4th at 440-441; *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 679; *Baker v. Mulholland Security and Patrol, Inc.* (2012) 204 Cal.App.4th 776, 782; *Hatai v. Department of Transportation* (2013) 214 Cal.App.4th 1287, 1299.) Therefore, there is no reason for Section 12965(b) to do what Sections 1032 and 1033.5 accomplish, state how costs are determined, or state how they are "treated."

Martin v. California Department of Veterans Affairs (9th Cir. 2009) 560 F.3d 1042 and *Brown v. Lucky Stores* (9th Cir. 2001) 246 F.3d 1182[7]

[7] Both cited in Williams' Opening Brief: *Brown v. Lucky Stores* (9th Cir. 2001) 246 F.3d 1182; *Martin v. California Department of Veterans Affairs*

also do not advance the parallel treatment argument. *Brown* held:

- The express provision governing costs and attorney's fees in the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12205) controls over the general costs provision in Federal Rule of Civil Procedure 54(d)(1);
- The ADA treats fees and costs parallel in allowing a prevailing party award of "a reasonable attorney's fee, including litigation expenses and *costs*"; and
- Because the ADA treats fees and costs parallel, *Christiansburg* also applies to costs.

But the ADA expressly states the reasonable attorney's fees includes "litigation expenses and costs" hence the parallel treatment. The same is not true of Section 12965 or Section 1033.5. Section 12965(b) is silent on how fees and costs are treated. Section 1033.5 expressly treats fees and costs differently, allowing costs as a matter of right and attorney's fees only when authorized by contract, statute, or law. (Sections 1032 & 1033.5(a)).

Also, contrary to Williams' representation (Opening Brief, pp. 16-17, fn. 6), Rule 54(d) is ***not*** like Section 1032. Rule 54(d) does not state costs should be allowed to the prevailing party ***as a matter of right;***[8] it

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(9th Cir. 2009) 560 F.3d 1042.

[8] The Opening Brief fn. 6 represents Rule 54(d)(1) as stating: "costs 'should be allowed to the prevailing party' as a matter of right '[u]nless a federal statute, these rules, or a court order provides otherwise...." The

states costs "should be allowed to the prevailing party" with no mention of "as a matter of right" a critical difference that does not make the costs award "a matter of right" as it is under Section 1032.

Martin also does not help, but harms, the parallel treatment argument. It relies on and reaches the same result as *Brown*, that under the specific language of the ADA, fees and costs are parallel, so *Christiansburg* also applies to costs.[9] But, the real import of *Martin* is its holding that fees and costs are not parallel under the Rehabilitation Act (29 U.S.C.§ 794a(b)), which permits the prevailing party to recover "a reasonable attorney's fee *as part of the costs,*" (emphasis added), which is the same as Title VII allowing "a reasonable attorney's fee . . . *as part of the costs,*" (emphasis added), both unlike the ADA, which permits an award of "a reasonable attorney's fee, *including* litigation expenses and costs" incorporating costs as part of the award of attorney's fees. (*Martin*, *supra*, 560 F.3d at 1052.)

Applying the logic of *Martin* necessarily means that fees and costs are not treated parallel under Section 1033.5 (or Section 12965(b) where

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words "as a matter of right" are not in quotation marks, appearing to acknowledge those are not the actual words of Rule 54 but failing to quote the correct language. Rule 54(d)(1) reads: "Unless a federal statute, these rules, or a court order provides otherwise, costs–other than attorney's fees–should be allowed to the prevailing party."

[9] As discussed in Section III(B)(1) of this brief, this Court has already rejected the argument that Section 12965(b) is the more specific statute, over Section 1033.5. (*Davis*, *supra*, 17 Cal.4th at 446.)

they are not "treated" at all). Under Section 1033.5 costs are not part of the attorney's fees. But, as in the Rehabilitation Act and Title VII, where attorney's fees can be part of the costs and costs and fees are not parallel, Section 1033.5(a)(10)(A)-(C) states attorney's fees can be an item of costs, when they are authorized by contact, statute, or law. Also similar to the Rehabilitation Act and Title VII, in which costs and fees are not parallel, Section 1033.5(c)(5) states: "When any statute of this state refers to the 'costs and attorney's fees,' attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a)," which allows attorney's fees to be awarded where authorized by "[S]tatute." Contrary to supporting application of the parallel treatment argument to FEHA cases, *Martin* directly contradicts this argument.

Cummings also does not support the parallel treatment argument. *Cummings* engaged in no analysis of whether attorney's fees and costs should be treated the same. It incorrectly stated that *Christiansburg* decided the standard for awarding attorney's fees ***and costs*** to a prevailing defendant, and based on that mistaken premise, bundled costs into its conclusion that fees and costs could not be awarded to a prevailing FEHA defendant without meeting *Christiansburg*.[10] (*Cummings v. Benco Bldg.*

[10] *Christiansburg* only held that a lawsuit must be frivolous, unreasonable, or groundless to award attorney's fees to a prevailing plaintiff. It did not

Services (1992) 11 Cal.App.4th 1383.) It is hardly a surprise that every appellate case that has actually analyzed the issue and correctly recited the holding in *Christiansburg*, has reached the opposite conclusion, holding *Christiansburg* does not apply to ordinary costs.[11] (*Perez, supra*, 111 Cal.App.4th at 681; *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 135; *Baker, supra*, 204 Cal.App.4th at 783-784; *Hatai, supra*, 214 Cal.App.4th at 1299.)

B. THIS COURT'S PRIOR RULINGS ESTABLISH THAT SECTIONS 1032 AND 1033.5 DEFINE THE COSTS A PREVAILING FEHA DEFENDANT IS ENTITLED TO UNDER SECTION 12965(B)

This Court has twice considered the interplay between Section 12965(b) and the costs provisions in the Code of Civil Procedure and found them to be compatible. (*Davis, supra*, 17 Cal.4th 436; *Chavez, supra*, 47 Cal.4th 970.) Critically, this Court held that Sections 1032 and 1033.5 determine the costs that are awardable to a prevailing party under Section 12962(b). These cases are dispositive of the issue presented here for review. (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 327.)

1. ***Davis*** **Holds Section 1033.5 Defines The Costs Awarded Under Section 12965(b).**

In *Davis,* this Court granted review to determine whether expert fees, not ordered by the Court, may be recovered by the prevailing party in

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address costs awards. (*Christiansburg, supra*, 434 U.S. at 422.)

[11] As discussed below in Section III(C)(2).

a FEHA action. Section 1033.5(b)(1) lists "fees of experts not ordered by the court" as one of the "items that are not allowable as costs, except when expressly authorized by law." After prevailing in a FEHA action, Davis sought expert witness fees as part of the costs to be awarded to him as the prevailing party under Section 12965(b). The trial court awarded the expert witness fees, the appellate court reversed, and this Court affirmed the appellate court's decision to deny expert witness fees in the FEHA action because they are not permitted under Section 1033.5.

The *Davis* plaintiff made multiple arguments, some similar to those Williams makes here. This Court rejected each of them and held that the costs awardable to a prevailing party under Section 12965(b) are defined and determined by Sections 1032 and 1033.5. Davis' arguments and this Court's rejection of each are as follows:

- ***First***, Davis argued Section 12965(b) stating "the court, in its discretion, may award to the prevailing party reasonable attorney fees and costs . . ." includes any and all items of costs, subject only to the trial court's discretion and costs is not defined by Section 1033.5. This Court disagreed, stating Section 12965(b) does not define costs, and both before and after Section 12965(b) was enacted it has been subject to other rules on which costs are allowable, which costs are non-allowable unless expressly authorized by law, and which other costs are allowable in the court's discretion. (*Davis, supra*, 17 Cal.4th at 439). Section 1033.5 simply

codified these costs rules which do not allow expert fees unless expressly authorized by statute. (*Id* at 441.) Also, this Court noted, the Legislature has created many exceptions to the general rule on expert witness costs, by shifting the fees of experts in certain specific actions[12] and could have created a similar exception in Section 12965(b) to apply to FEHA actions, but did not. (*Id.* at 442). Without the express exception required by Section 1033.5, the court could not award expert fees non-allowable under Section 1033.5(b).

- ***Second***, this Court rejected Davis' argument that Section 12965(b) and Sections 1032 and 1033.5 conflict and that Section 12965(b) must prevail as the more specific statute. Section 12965(b) and Sections 1032 and 1033.5 do not conflict; both before and after Section 12965(b) there

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[12] This Court gave multiple examples as follows:

> [A] mandate action by a licensed land surveyor or a registered civil engineer to compel the filing of a record of survey, "the court may award to the prevailing party costs and other expenses of litigation, including the payment of experts and other witnesses, and reasonable attorney's fees." (Bus. & Prof. Code, § 8768.5; see also, e.g., Corp. Code, § 1305, subd. (e) [action to compel the purchase of dissenting shareholders' interests]; Gov. Code, § 8670.56.5, subd. (e) [action under the Lempert-Keene-Seastrand Oil Spill and Response Act]; Harb. & Nav. Code, § 294, subd. (e) [action under Miller Anti-Pollution Act of 1971]; Civ. Code, §§ 987, subd. (e)(4), 989, subd. (f)(1) [action to preserve or restore art work]; Civ. Code, § 1745, subd. (d) [action against a dealer in art objects produced in more than one copy]; Fam. Code, § 7553 [action to determine paternity]; Code Civ. Proc., § 1036 [action for inverse condemnation]; *id.*, § 1038, subd. (b) [action under California Tort Claims Act]; *id.*, § 1141.21, subd. (a)(iii) [judgment on trial de novo].)

(*Davis, supra*, 17 Cal.4th at 442; footnote omitted.)

were rules about which costs a prevailing party could and could not obtain, and Section 1033.5 simply codified existing law. It did not impliedly repeal any other statute. Also as this Court held:

> Nor is Government Code section 12965, subdivision (b), the more specific statute. It uses the bare term "costs," while Code of Civil Procedure section 1033.5 defines the term by codifying the rules specifying which "costs" are allowable, which are nonallowable, and which are within the trial court's discretion. (*Davis*, *supra*, 17 Cal.4th at 443.)

Also, this Court held:

> The present case does not involve a direct conflict between statutes. FEHA does not expressly provide that "costs" may include the fees of experts not ordered by the court. Nor does it purport to define "costs." Rather, as discussed, ***Code of Civil Procedure section 1033.5 defines which costs are allowable and which are not; it thus explains, rather than contradicts, Government Code section 12965.***

(Davis, *supra*, 17 Cal.4th at 446, emphasis added).

- **Third**, this Court rejected Davis' argument that applying the definition of costs in Section 1033.5 to Section 12965(b) renders the costs provision of Section 12965(b) "superfluous" explaining:

> Plaintiff also argues that applying the definition of costs under Code of Civil Procedure section 1033.5 renders "superfluous" the costs provision of Government Code section 12965, subdivision (b). Again, he is unpersuasive. As discussed, Code of Civil Procedure section 1033.5 was intended to give a more precise meaning to the term "costs" in existing fee-

> shifting statutes-including Government Code section 12965, subdivision (b)-by defining which items of costs are allowable and which are not. As in *Gray v. Phillips Petroleum Co.*, supra, 971 F.2d at page 595, however, even if we were to agree that reading the two statutes together results in some redundancy that is insufficient to provide the requisite express statutory authority necessary to shift the fees of an expert not ordered by the court.

(Davis, supra, 17 Cal.4th at 443-444.) This Court also observed that even if Sections 12965(b) and Section 1033.5 were redundant, that would not create the required statutory authority to award expert fees.

- ***Fourth***, this Court rejected Davis' argument that Section 1033.5 renders meaningless the Section 12965(b) language that the court "in its discretion" may award attorney's fees and costs. The trial court has discretion under Section 1033.5, to determine whether any allowable costs were "reasonably necessary" and "reasonable in amount" and importantly, it also has discretion to award or deny any additional costs that are not identified as either allowable or non-allowable in Section 1033.5.

- ***Fifth***, and finally, this Court rejected Davis' argument that the Court could create decisional law based on public policy by carving out an exception for FEHA actions. Again, this Court disagreed, holding the Legislative intent in enacting Section 1033.5 was "to codify existing law, not to permit courts to craft new decisional law concerning what are allowable items of costs." (*Davis, supra,* 17 Cal.4th at 445.)

Shortly after *Davis,* in 1998, the Legislature amended Section 12965(b) to provide the express statutory authorization this Court stated was necessary to allow a prevailing party in FEHA cases to obtain expert fees. (*Olson v. Auto. Club of S. California* (2008) 42 Cal.4th 1142, 1149 fn. 4.) The Legislature has amended Section 12965(b) twice since then, in 1999 and 2012. This is significant because it is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Hence, reenacted portions of the statute are given the same construction they received before the amendment. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734.) See, *e.g.*, *In re Gladys R.* (1970) 1 Cal.3d 855, 868–869; *Brailsford v. Blue* (1962) 57 Cal.2d 335, 339; *Richfield Oil Corp. v. Public Util. Com.* (1960) 54 Cal.2d 419, 430; *Buckley v. Chadwick* (1955) 45 Cal.2d 183, 200; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659.)

Each of the three times, the Legislature amended Section 12965(b), it was well aware that this Court had determined that costs in Section 12965(b) are defined and determined by Sections 1032 and 1033.5. That is the reason for the amendment in 1998, to provide the express statutory authorization for expert fees required under Section 1033.5(b). The fact

that the Legislature did not alter Section 12965(b) to define costs separate and apart from the definition of costs in Sections 1032 and 1033 means the Legislature intended to continue to define costs in Section 12965(b) by applying the general costs statutes in Sections 1032 and 1033.5, which was the Legislative intent in the first place.

2. *Chavez* And The First District's Ruling In *Holman* Collectively Hold That Other Code Of Civil Procedure Sections On Costs And Attorney's Fees Apply To FEHA Actions And Do Not Conflict With Section 12965(B)

a. *Chavez v. City of Los Angeles*

In *Chavez, supra*, 47 Cal.4th at 986, this Court considered the interplay between *S*ection 12956(b) and another general costs section, Code of Civil Procedure, Section 1033(a),[13] and whether they conflict. After Chavez recovered damages of $11,500, he sought attorney's fees (of $870,935) under Section 12965(b), which the trial court denied based on Section 1033 disallowing attorney's fees (as part of the costs) where an action is not brought as a limited civil case and the recovery is less than half the limited civil case $25,000 (see Code of Civ. Proc. § 86) jurisdictional limit. (*Id.* at 976.) Chavez challenged this, arguing the denial of attorney's fees under Section 1033(a) conflicted with Section 12965(b) stating the prevailing party in a FEHA action is entitled to an award of

[13] Set forth between Sections 1032 and 1033.5, as part of the general costs statutes in the Code of Civil Procedure.

attorney's fees. The Appellate Court agreed with Chavez holding Section 1033(a) does not apply to FEHA actions and that Section 12965(b) is the sole applicable statute.

This Court reversed. (*Id.* at 986.) This Court ruled there was no irreconcilable conflict between Section 1033(a) and Section 12965(b) explaining:

> Giving effect to the plain meaning of the statutory language at issue, and construing the relevant statutory provisions in a way that allows both to be given effect, we hold, therefore, that ***section 1033(a), which grants the trial court discretion to deny costs to a plaintiff who recovers damages that could have been recovered in a limited civil case, applies to actions asserting FEHA claims.***

(*Id.* at 989, emphasis added.) This Court's decision directly affirms that the general costs provisions in the Code of Civil Procedure do not conflict with Section 12965(b) and that both the rights and restrictions set forth in these general costs provisions apply in FEHA cases.

b. *Holman v. Altana Pharma US, Inc.*

In *Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, the First District Court of Appeal considered the interplay between Section 12965(b) and three sections of the Code of Civil Procedure, Sections 998, 1032, and 1033.5, in a dispute involving the award of expert witness fees to the prevailing defendant in a FEHA lawsuit. Section 1033.5(b)(1) provides expert fees are not recoverable unless expressly authorized by law. Section

12965(b) authorizes expert witness fees to a prevailing party in FEHA actions. Section 998 also provides for an award of expert witness fees to defendants in all types of cases under certain specified circumstances, including where the plaintiff's award is not more favorable than the defendant's pre-judgment offer.

Defendant Altana sought and was awarded expert witness fees under Section 998. Plaintiff Holman argued Section 998 "has no application because costs are 'otherwise expressly provided by statute' (Code of Civ. Proc. § 1032, subd. (b)) in Section 12965" and because Section 998 disallows expert witness fees to a prevailing plaintiff in some circumstances, it conflicts with Section 12965(b) on awarding expert witness fees to the prevailing party in FEHA cases ." (*Id.* at 281-282.)[14] The *Holman* Court disagreed, holding: "As in *Murillo*, there is nothing in section 12965 that *expressly* disallows an award of expert witness fees to a prevailing FEHA defendant under Code of Civil Procedure 998. To the contrary, unlike the Song-Beverly Act, the statute expressly *allows* recovery by any prevailing party." (*Id.* at 281.)[15] Importantly, the Court also held that even if *Christiansburg* applies to an award of expert witness fees awarded under Section 12965(b):

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[14] Section 998 both disallows ***and*** allows expert witness fees in circumstances that are different than allowed or disallowed under Section 12965(b).

[15] *Murillo* refers to this Court's decision in *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985.

> [T]here is nothing in section 12965 that *expressly* disallows an award of expert witness fees to a prevailing FEHA defendant unless the *Christiansburg* standard is met. Thus, even if the *Christiansburg* standard implicitly applies when prevailing defendants seek to recover expert witness fees under section 12965, we conclude that the trial court was authorized to exercise its discretion under Code of Civil Procedure section 998 to award expert witness fees here.

(Id. at 281-282.) Therefore, *Holman* correctly held, in reliance on this Court's *Murillo* and *Chavez* decisions, that statutes do not conflict where they entitle a party to a particular type of costs under different circumstances and according to different standards, such as if Section 12965(b) entitles a prevailing defendant to expert witness costs only if *Christiansburg* is met[16] and Section 998 entitles a prevailing defendant to expert witness costs without meeting *Christiansburg* where the plaintiff's recovery is less than a prejudgment offer. See also *Agnew v. State Bd. of Equalization* (2005) 134 Cal.App.4th 899, 915 [prevailing party entitled to costs, "and possibly expert witness fees as well, under the general cost provisions of the Code of Civil Procedure even if he did not satisfy the Revenue and Taxation Code section 7156 criteria which would have entitled him to attorney fees as well as costs and expert witness fees"].

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[16] Subsequent to *Holman*, *Baker, supra* (2012) 204 Cal.App.4th 776, held *Christiansburg* applies to an award of expert witness fees under Section 12965(b), a possibility the *Holman* court considered in reaching its decision.

Therefore, the Court concluded, an award *of* expert witness fees can be subject to one standard under one statute and another standard under another statute, and those statutes are compatible.[17]

The logic of *Holman* supports that there is no conflict between Sections 1032 and 1033.5 and Section 12965(b). They are all statutes authorizing an award of costs. The costs provided for in Sections 1032 and 1033.5 are subject to the standards and rules set forth therein, "except as otherwise expressly provided by statute," and the only exception in Section 12965(b) to the costs allowable and disallowed in section 1033.5, is that a prevailing party may be awarded expert witness fees which are otherwise disallowed under Section 1033.5.

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[17] In addition to relying on *Murillo*, the *Holman* Court also relied on this Court's decision in *Chavez* stating:

> We note that, in a slightly different context, our Supreme Court recently found no conflict between the FEHA provisions for attorney fees under section 12965, and the provisions of Code of Civil Procedure section 1033, subdivision (a), allowing the trial court discretion to deny fees where an action could have been brought as a limited jurisdiction case.

(*Holman v. Altana Pharma US, Inc.*, *supra*, 186 Cal.App.4th at 281, quoting *Chavez*, *supra*, 47 Cal.4th at 986–989.)

C. THE WEIGHT OF APPELLATE AUTHORITY CORRECTLY HOLDS THAT A PREVAILING FEHA DEFENDANT IS ENTITLED TO ORDINARY COSTS AS A MATTER OF RIGHT AND *CHRISTIANSBURG* DOES NOT APPLY

1. The *Christiansburg* Rule

In *Christiansburg,* the United States Supreme Court addressed the standard for awarding a prevailing Title VII[18] defendant ***attorney's fees*** and whether the standard is different than for a prevailing plaintiff who is ordinarily entitled to an attorney's fees award in all but special circumstances.[19] (*Id.* at 418.) The Court held that a prevailing Title VII defendant is entitled to attorney's fees only when a court finds the plaintiff's claims were frivolous, unreasonable, or groundless. (*Id.* at 422.) *Christiansburg* did not hold that this standard applies to costs awarded to a prevailing Title VII defendant. That issue was not even considered. *Christiansburg* had nothing to do with an award of costs under Title VII.

Appellate Courts in California have followed *Christiansburg* concluding that while a prevailing FEHA plaintiff should ordinarily recover

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[18] Title VII refers to Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in Volume 42 of the United States Code, beginning at Section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.

[19] Section 706(k) of Title VII (42 U.S.C. § 2000e-5) is the statute addressing fee awards under Title VII. It states: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

attorney's fees absent special circumstances making the award unjust, a prevailing defendant cannot recover attorney's fees unless the action was unreasonable, frivolous, or groundless. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 419; *Young v. Exxon Mobil Corp.* (2011) 168 Cal.App.4th 1467, 1474.)[20] [21]

2. Five California Appellate Cases Have Rejected Adopting The Same Standard As *Christiansburg* To A Prevailing FEHA Defendant *Costs Award* And Hold A Prevailing FEHA Defendant Is Entitled To Ordinary Costs As A Matter of Right

California cases treat costs awards to prevailing FEHA defendants differently than awards of attorney's fees. These cases each hold that a prevailing FEHA defendant is entitled to an *award* of ordinary costs as a matter of right and need not establish the action was unreasonable, frivolous, or groundless. (*Perez, supra*, 111 Cal.App.4th at 680; *Knight,*

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[20] *Chavez* mentions that California courts have adopted the *Christiansburg* rule for awarding attorney's fees under FEHA, citing appellate courts only, but does not cite any California Supreme Court case that has directly addressed this. (*Chavez, supra*, 47 Cal.4th at 985.)

[21] Not all state courts apply *Christiansburg* to an award of attorney's fees to a prevailing defendant in a state discrimination case. *See e.g., Moody-Herrera v. State of Alaska Dept. of Natural Resources* (1998) 967 P.2d 79, 89, in which the Alaska Supreme Court rejected applying *Christiansburg* to an award of attorney's fees to a prevailing defendant in a lawsuit brought under State anti-discrimination laws, holding that "Alaska follows a fundamentally different principle. Prevailing parties in Alaska are normally entitled to recover a part of their attorney's fees" so "limitations added by the United States Supreme Court in *Christiansburg* to awards of attorney's fees in Title VII cases are therefore irrelevant to determination of attorney's fees in Alaska" (*Id.* at 89.)

supra, 132 Cal.App.4th at 135-136; *Baker, supra*, 204 Cal.App.4th at 784; *Hatai, supra*, 214 Cal.App.4th at 1299.) [22]

The first two cases, *Perez* and *Knight* both considered and decided the precise issue raised here and held *Christiansburg* only applies to FEHA attorney's fees awards under Section 12965(b), not to ordinary costs award under Section 1032. (*Perez, supra*, 111 Cal.App.4th at 680; *Knight* 132 Cal.App.4th at 135-136.) *Perez* provided a detailed and instructive rationale for this conclusion. (*Id.* at 679-681.) First, it *noted*, the right to recover costs exists solely by operation of statute. (*Id.* at 670, citing *Murillo, supra*, 17 Cal.4th at 989.) The language of Section 1032 states: "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding" and Section 12965(b) does not state an exception to Section 1032(b) because it does not expressly disallow the recovery of costs by prevailing defendants. (*Perez, supra,* 111 Cal.App.4th at 678-681.) Second, *Perez* explained the reason for treating attorney's fees differently than ordinary costs:

> The rationale for this distinction is clear. Whereas the magnitude and unpredictability of attorney's fees would deter parties with meritorious claims from litigation . . . . costs could be thwarted every time the unsuccessful party is a normal, average party and not a knave,

[22] The appellate decision in this case, *Williams v. Chino Valley Independent Fire District* (2013) 218 Cal.App.4th 73, was the fifth.

> Rule 54(d) [Federal Rule equivalent to Section 1032(b)] would have little substance remaining."

(*Perez, supra,* 111 Cal.App.4th at 681, quoting *Poe v. John Deere Co.* (8th Cir. 1982) 695 F.2d 1103, 1108 and *Popeil Bros., Inc. v. Schick Electric, Inc.* (7th Cir. 1975) 516 F.2d 772, 776.)

The third case, *Baker* held that like attorney's fees, expert fees under Section 12965(b) are subject to *Christiansburg* but confirmed ordinary Section 1032 costs are not. *Baker* explained Section 1033.5 treats attorney's fees and expert fees the same, both are not allowable unless authorized by statute, as they are in FEHA cases through Section 12965(b). Conversely, ordinary costs are routinely shifted, and no separate statutory authority is required. *Baker* explained:

> We agree the standard applicable to attorney's fees should apply to expert witness fees for a prevailing FEHA defendant. Expert fees, just like attorney's fees, are not ordinary litigation costs which are routinely shifted under Code of Civil Procedure sections 1032 and 1033.5. Like attorney's fees, expert fees should be treated differently than ordinary litigation costs because they can be expensive and unpredictable, and could chill plaintiffs from bringing meritorious actions. (See, e.g., *Perez, supra,* 111 Cal.App.4th at p. 681, 3 Cal.Rptr.3d 867 ["'Whereas the magnitude and unpredictability of attorney's fees would deter parties with meritorious claims from litigation, the costs of suit in the traditional sense are predictable, and, compared to the costs of attorneys' fees, small.' [Citation.]"].) Just like attorney's fees, expert witness fees authorized by Government Code section 12965 are subject to the trial court's discretion and are not recoverable

> as a matter of right, as are other routine litigation expenses. (Compare Gov. Code, § 12965, subd. (b) ["the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees"] with Code Civ. Proc., §§ 1032, subd. (b) ["Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding."] & 1033.5.)

(*Baker, supra*, 204 Cal.App.4th at 783.)

The fourth case, *Hatai*, is also unequivocal in its holding that *Christiansburg* does not apply to a prevailing FEHA defendant's ordinary costs award. (*Hatai, supra*, 214 Cal.App.4th at 1299.)

The appellate *decision* in this case is the fifth published appellate authority[23] confirming *Christiansburg* does not apply to an ordinary costs award to a prevailing FEHA defendant. The Fourth District agreed with *Perez* that Section 12965 does not state an exception to Section 1032 and that costs are therefore recoverable under that section.[24]

Perez, Knight, Baker, Hatai, and the appellate decision in this case, make it clear that a prevailing defendant in a FEHA *action* is entitled, as a matter of right, to an award of ordinary costs under Section 1032,

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[23] By granting review of *Williams v. Chino Valley Independent Fire District* (2013) 218 Cal.App.4th 73, this Court effectively depublished the court of appeal opinion. The appellate court opinion is superseded and will not be published unless the Supreme Court otherwise directs. (Cal. R. Ct 8.1105(e).)

[24] The decision of the Fourth District Court of Appeal on this sole issue is eighteen pages.

Christiansburg does not apply, and ordinary litigation costs routinely shifted under Sections 1032 and 1033.5 are not limited to actions deemed to be frivolous, unreasonable, or groundless.

3. ***Cummings*, The Sole California Authority Stating A Prevailing FEHA Defendant Costs Award Is Subject To *Christiansburg* Did Not Independently Address Costs And Is Not Reliable, Reasoned Or Correct Authority On The Issue Of Costs**

Cummings v. Benco Bldg. Services (1992) 11 Cal.App.4th 1383 is the sole California case holding the federal *Christiansburg* standard that attorney's *fees* may only be awarded to a *prevailing* Title VII defendant where the action is frivolous, unreasonable, or groundless, applies to a *costs* award to a prevailing FEHA defendant. Relying on *Christiansburg*, *Cummings* held a losing plaintiff in a FEHA case should not be assessed *attorneys' fees* ***and*** *costs* unless the claim was "frivolous, unreasonable, or groundless" or "the plaintiff continued to litigate after it clearly became so." (*Cummings, supra,* 11 Cal.App.4th at 1388.)

Cummings, is not instructive authority on the issue in this case, of whether an award of ordinary costs under Section 1032 to a prevailing FEHA defendant is subject to *Christiansburg* and only allowed where the action was frivolous, unreasonable, or groundless. There are four key reasons *Cummings* is not instructive authority and should not be relied on:

- **First,** *Cummings* relies on *Christiansburg* in holding that attorney's fees and costs can only be awarded to a prevailing FEHA defendant where

the case is frivolous, unreasonable, or groundless. *Cummings* makes the following statements and cites *Christiansburg* for the proposition that it considered both attorney's fees and costs:

> The standard a trial court must use in exercising its discretion in awarding fees and costs to a prevailing defendant was set forth in the Supreme Court's decision in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412 [54 L.Ed.2d 648, 98 S.Ct. 694].
>
> **********
>
> Thus, the court found the standard for awarding prevailing defendants attorney fees and costs should be entirely different [than the standard for awards to prevailing plaintiffs].
>
> **********
>
> As the Supreme Court cautioned, this fact should not automatically entitle a prevailing defendant to fees and costs or otherwise only those plaintiffs with the most airtight cases will risk bringing suit to enforce antidiscrimination legislation. (*Christiansburg Garment Co. v. EEOC, supra,* 434 U.S. at p. 422 [54 L.Ed.2d at p. 657].)

(*Cummings, supra,* 11 Cal.App.4th at 1387 & 1390.)

But, *Cummings* is incorrect. *Christiansburg* only considered attorney's fees, not costs. It decided that attorney's fees may only be awarded to a prevailing Title VII defendant where the *lawsuit* was frivolous, unreasonable, or groundless. It did not address the issue of costs or the standard of awarding costs to a prevailing Title VII defendant. Exemplifying the inappropriate bundling of attorney's fees and costs and

lack of any meaningful analysis, although *Cummings* cites *Christiansburg* as though it decided the issue of attorney's fees and costs, *Cummings* contains quotes from *Christiansburg* that only mention attorney's fees and say nothing about costs:

> In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
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> Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." (434 U.S. at pp. 421-422 [54 L.Ed.2d at pp. 656-657].)

(*Cummings, supra,* 11 Cal.App.4th at 1387-1388.)

Perez observed that *Cummings* relied on *Christiansburg* for a proposition *Christiansburg* never considered: "But, the issue in *Christiansburg* was limited to the recovery of attorney fees. Costs outside of those fees were not an issue." (*Perez, supra,* 111 Cal.App.4th 671, 680.) Therefore, *Cummings* relied on *Christiansburg* for a proposition *Christiansburg* did not consider or adopt, and that was rejected when subsequently considered by other courts. *See e.g. National Organization for Women v. Bank of California* (9th Cir. 1982) 680 F.2d 1291; *Martin, supra,* 560 F.3d at 1052 [Rejecting application of the *Christiansburg*

standard in awarding costs to a prevailing Title VII defendant and holding that costs to a prevailing defendant in a Title VII action follow the general rule that costs are awarded under Fed. R. Civ. P. 54(d) as a matter of course absent an express statutory provision].

Knight also made this observation and referenced the discussion in *Perez* on this:

> In *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 3 Cal.Rptr.3d 867 (*Perez*), the Court of Appeal pointed out that, as the *Cummings* court did not fully appreciate, "the issue in *Christiansburg* was limited to the recovery of *attorney fees.* Costs outside of those fees were not at issue. In *Cummings,* the court did not segregate the two parts of the award in applying *Christiansburg,* but overturned them together." (*Perez,* at p. 680, 3 Cal.Rptr.3d 867.) The *Perez* court found the blending of fees and costs in *Cummings* unnecessary and inappropriate, pointing out that "[s]everal federal courts themselves have refused to apply the *Christiansburg* test for recovery of defense attorney fees to ordinary litigation expenses. [Citations.]
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> *******
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> Unlike the court in *Cummings,* which did not focus on costs, and simply assumed they should be treated in the same manner as attorney fees, the *Perez* court explained that the policies justifying the *Christiansburg* standard for awarding attorney fees to a prevailing defendant do not persuasively apply to the award to such a party of costs.

(*Knight, supra,* 132 Cal.App.4th at 135.)

- ***Second,*** in *Cummings*, the discussion of attorney's fees and costs were not segregated; they were *lumped* into one. There was no independent analysis of the standard for awarding costs versus attorney's fees to a prevailing FEHA defendant. The *Perez* Court also noted this defect in rejecting the argument that *Cummings* was not persuasive authority for the proposition that costs cannot be awarded to a prevailing defendant in a FEHA action, absent a finding that the claim was frivolous, unreasonable, or groundless. (*Perez, supra,* 111 Cal.App.4th at 680.) As the *Perez* Court stated: "In *Cummings*, the court did not segregate the two parts of the award [fees and costs] in applying *Christiansburg*, but overturned them together. . . . We find this blending of fees and costs to be unnecessary and inappropriate." (*Ibid.*) The Fourth District also focused on *Cummings'* failure to separately analyze costs under Sections 1032 and 1033.5 separately from attorney's fees, stating: "We agree with *Perez* and *Knight* that was the error of Cummings." (*Williams, supra*, 218 Cal.App.4th at 12.) As *Cummings* does not analyze or even separate costs, it should not be relied on as sound authority on the costs issue.

A case that offers no analysis on the issue it is being cited for does not constitute persuasive authority. (*Davis, supra*, 17 Cal.4th at 457.) A case is not sound or reliable authority for a proposition it did not fairly consider or analyze. (*Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 405 [case addressing causation in the context of third-party

liability insurance, but not the first-party property insurance context, should not be relied on to address whether concurrent causation could apply in the first-party property insurance context]. It is, therefore, not sound to rely on *Cummings* for the proposition that a prevailing FEHA defendant costs *award* is only allowed where the action was "frivolous, unreasonable, or groundless," a proposition it never independently considered. (*McDowell and Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38 [cases are not authority for propositions not considered].)

- ***Third***, *Cummings* never considered the fundamental issue of a prevailing defendant's right under Section 1032 that: "Except as otherwise expressly provided by statute, a prevailing party is entitled ***as a matter of right*** to recover costs in ***any*** action or proceeding." *Cummings* also never considered the fundamental issue of the interplay between Section 1032 and Section 12965(b). *Cummings* is not sound or reliable authority for a proposition it did not fairly consider or analyze. (*Garvey*, *supra*, 48 Cal.3d at 405.) Conversely, unlike *Cummings*, the subsequent cases, all considered this precise issue raised in this appeal, whether a prevailing FEHA defendant may be awarded ordinary costs as the prevailing party under Section 1032 where there is no finding that the FEHA action was frivolous, unreasonable, or groundless. After analyzing the issue, all five appellate decisions concluded *Christiansburg* does not apply. (*Perez, supra,* 111 Cal.App.4th at 675-677*; Knight, supra*, 132 Cal.App.4th at 134*;*

Baker, supra, 204 Cal.App.4th at 135 ; *Hatai, supra*, 214 Cal.App.4th at 1299, and *Williams, supra,* 218 Cal.App.4th 73.)

- ***Fourth,*** *Cummings* was decided in 1992, and preceded *Perez, Knight, Baker, Hatai,* and *Williams.* These five other appellate cases span a decade, from 2003 to 2013, during which no other appellate authority agreed with *Cummings* on the issue of costs. These five other appellate cases are collectively from four different District Courts of Appeal (the First, Second, Fourth and Sixth Districts). These subsequent appellate authorities considering the standard for awarding authorities post *Cummings* have criticized, some heavily, *Cummings.* See *Perez, supra,* 111 Cal.App.4th at 680-681*; Knight, supra*, 132 Cal.App.4th at 134*; Baker, supra,* 204 Cal.App.4th at 783-784; *Hatai, supra*, 214 Cal.App.4th at 1299, and *Williams, supra,* 218 Cal.App.4th 73. This Court has held that where a sole case states a rule contrary to multiple other decisions, it is properly considered overruled. (*Bell v. Pleasant* (1904) 145 Cal. 410, 414 [This is the only case which states the rule contrary to the numerous decisions cited above, and it must be considered as overruled]; *Dollenmayer v. Pryor* (1906) 150 Cal. 1, 3 [Anything in *Wenborn v. Boston* (1863) 23 Cal. 321, contrary to this rule, must be considered as overruled by these later decisions.]; *Cassin v. Nicholson* (1908) 154 Cal. 497, 507 [If the case of *Farish v. Coon* (1870) 40 Cal. 33, shall be deemed to announce a contrary doctrine, it must be considered overruled by the later and better authority].)

D. PUBLIC POLICY DOES NOT REQUIRE OR ALLOW APPLICATION OF *CHRISTIANSBURG* TO A PREVAILING FEHA DEFENDANT'S ORDINARY COSTS AWARDS

1. The Statutory Scheme Embodies The Public Policy That Prevailing Parties In *Any* Action Are Entitled To Ordinary Costs And Courts May Not Contravene Public Policy By Judicial Creation Of Legislative Intent

Legislative enactments are expressions of public policy. (*Topanga Assn. for a Scenic Cmty. v. Cnty. of Los Angeles* (1989) 214 Cal.App.3d 1348, 1365-1366, citing *English v. Marin Mun. Water Dist.* (1977) 66 Cal.App.3d 725, 730, disapproved on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707.) A statute is not subject to objection on the ground it contravenes public policy because, as a legislative enactment, it becomes public policy. (*Id.*)

Here, Sections 1032 and 1033.5 reflect this State's public policy that prevailing parties are entitled to an award of ordinary costs unless otherwise expressly provided by statute. As this Court has held, costs awarded under Section 12965(b) are defined by Sections 1032 and 1033.5. (*Davis, supra*, 17 Cal.4th at 441. This public policy embodied in the applicable statutes cannot be displaced based on public policy considerations that would result in altering the clear mandate of the statutes. Depriving a prevailing FEHA defendant the right to ordinary costs under Sections 1032 and 1033.5 based on purported public policy considerations

would directly conflict with the Legislature's expression of public policy entitling a prevailing party to those costs as a matter of right.

Courts cannot ignore the words of a statute attempting to vindicate the court's perception of the Legislative purpose in enacting the law. *Murillo*, 17 Cal.4th at 993. This fundamental principle has been repeatedly confirmed: "This Court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Id.* at 993, quoting *California Teachers Assn. v. Governing Board of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, quoting *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365.)

This Court has already rejected the argument that Courts may create decisional law based on public policy by carving out an exception for FEHA actions, holding the Legislative intent in enacting Section 1033.5 was "to codify existing law, not to permit courts to craft new decisional law concerning what are allowable items of costs." (*Davis*, *supra*, 17 Cal.4th at 445).

2. Courts Consistently Recognize That Policy Reasons For Applying *Christiansburg* To Prevailing FEHA Defendant Attorney's Fees And Expert Witness Fee Awards Do Not Apply To Ordinary Costs Awards

The rationale for the Legislative policy for treating attorney's fees differently than costs is no mystery. As *Perez* explains:

> The rationale for this distinction is clear. Whereas the magnitude and unpredictability of

> attorney's fees would deter parties with meritorious claims from litigation . . . . the costs could be thwarted every time the unsuccessful party is a normal, average party and not a knave, Rule 54(d) [Federal Rule equivalent to Section 1032(b)] would have little substance remaining.

(*Perez, supra,* 111 Cal.App.4th at 681, quoting *Poe v. John Deere Co.* (8th Cir. 1982) 695 F.2d 1103, 1108 and *Popeil Bros., Inc. v. Schick Electric, Inc.* (7th Cir. 1975) 516 F.2d 772, 776.) *Baker* too discusses the rationale behind the policy of treating ordinary costs awards and attorney's fees differently.[25] (*Baker, supra,* 204 Cal.App.4th 776.)

The costs statutes contain protections against outlier unreasonable costs awards. Section 1033.5(c)(2)(3) requires costs awards to be reasonable. The costs shall be both reasonably necessary to the litigation, not just convenient or beneficial, and reasonable in amount. This places a check on the amount of costs incurred, requiring a reasonableness standard both as to the necessity for the cost in the first place and reasonableness of the amount.

Also, *Knight* recognized that while costs awards could be considerable in some FEHA cases, equitable considerations could warrant denial of a cost award where a non-prevailing defendant pleads and demonstrates an award would impose undue hardship or otherwise impose undue hardship. (*Knight, supra,* 132 Cal.App.4th at 136.) *Holman* also

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[25] *See* discussion re *Baker* on p. 40-41.

addressed the option of "scaling" down costs awards to not pressure modest or low income plaintiffs, and that circumstances may call for Section 998 experts fees awards to prevailing FEHA defendants to be lowered, as *Perez* and *Baker* recognized regarding lowering Section 1032 costs awards. (*Holman, supra*, 186 Cal.App.4th at 283.)

Importantly, the broad public policy expressed in one statute does not allow the courts to ignore the Legislative policy expressed in another statute. In considering whether a FEHA plaintiff must pay defendant's expert witness fees because the amount of plaintiff's judgment was less than defendant's Section 998 offer to compromise, *Holman* stressed the important public policy of Section 998, to encourage the settlement of lawsuits, could not be overlooked and considered the public policy behind ***both*** FEHA and Section 998. Similarly, this Court has also confirmed that a statute designed to encourage individuals to enforce their rights, the Song Beverly Act, does not override the Legislature's desire expressed in Section 998 to encourage the settlement of lawsuits. (*Murillo, supra*, 17 Cal.4th at 1001.)

These principles, articulated in *Holman* and *Murillo,* that the policies behind all involved statutes must be considered, apply here with equal force. Section 1032 grants the routine and ordinary costs to the prevailing party and reflects the policy of reimbursing basic costs to a prevailing

defendant,[26] who was burdened with the heavy costs of litigation through no choice or fault of its own and who the law has judged to be legally correct in the particular dispute litigated. Sections 1032 and 1033.5 implement this policy and must be adhered to.

3. Multiple Civil Rights And Consumer Statutes Embodying Important Public Polices Also Do Not Apply *Christiansburg* To Prevailing Defendant Costs Awards

FEHA plaintiffs are not the only plaintiffs suing under civil rights or consumer laws required to pay ordinary costs to prevailing defendants. In *Murillo*, the Plaintiff sued under the Song-Beverly Consumer Warranty Act (known as the "Lemon Law") which is "manifestly a remedial measure, intended for the protection of the consumer" and which should be "given a construction calculated to bring its benefits into action." (*Murillo, supra*, 17 Cal.4th at 990.) The *Murillo* plaintiff challenged the order that he pay costs under Section 1032 and expert witness fees under Section 998 to the prevailing defendant he sued, a retail car dealer. This Court discussed the important pro-consumer remedies in the Song-Beverly Consumer Warranty Act but upheld both the ordinary costs award under Section 1032 and the expert fees award under Section 998, stating "as with other disputes over statutory interpretation, we must attempt to effectuate the probable intent of

[26] Many of which are small businesses, non-profit organizations, or government entities that are seriously impacted by the fees and costs of defending litigation and should at least recover ordinary costs when adjudicated to be the prevailing party and legally free of culpability.

the Legislature, as expressed through the actual words of the statutes in question. (*Ibid.*)

Even in many Title VII[27] cases, the exact civil rights statute *Christiansburg* sought to promote, courts allow prevailing defendants to recover ordinary costs, without meeting the *Christiansburg* standard. The Ninth Circuit has held the *Christiansburg* standard does not apply to an award of ordinary litigation costs to a prevailing defendant under Title VII. (*National Organization for Women, supra,* 680 F.2d at 1294.)

In *Byers v. Dallas Morning News, Inc.* (5th Cir. 2000) 209 F.3d 419, 429, the Fifth Circuit upheld an award of costs to the prevailing defendant in a Title VII case holding the *Christiansburg* standard did not apply and explaining as follows:

> We hold that the district court correctly awarded costs to TDMN. Federal Rule of Civil Procedure 54 governs the award of costs in cases brought in federal court: "[e]xcept when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P. 54. Title VII does not expressly provide otherwise, and the standard procedure is to award costs to the prevailing party in Title VII suits. The "prevailing party" standard for awarding costs under Rule 54(d)(1) is less stringent than the prevailing party test for awarding attorney's fees under Title VII. Furthermore, this Court has held that the *Christiansburg* standard for

[27] Title VII of the Civil Right Act of 1964, 42 U.S.C. § 2000e.

> determining whether a defendant is a prevailing party under Title VII does not apply to an award of costs.

(*Ibid.*)

The Seventh Circuit reached the same conclusion and applied the same reasoning. It stated as follows in explaining why the District Court's application of the *Christiansburg* standard in declining to award costs to a prevailing Title VII defendant was incorrect:

> [T]he district court's rationale was that plaintiff's claims were colorable and the taxation of substantial costs against her would "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII," citing *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). We assume, as Judge Shadur later explained, that in this context "colorable" is the equivalent of "reasonably grounded." The narrow issue, then, is whether those grounds are proper ones for refusing to award costs to the winning party. That plaintiff's case was reasonable or even close is plainly not enough in itself. This court so held in *Popeil Brothers,* 516 F.2d at 776 (*e.g.*, "If the awarding of costs could be thwarted every time the unsuccessful party is a normal average party and not a knave, Rule 54(d) would have little substance remaining").
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> As for the fact that this was a Title VII suit, the quotation the court below took from *Christiansburg Garment* related to attorneys' fees, not to costs, and involved a new and different statutory provision (§ 706(k) of Title VII) which was much less mandatory in allowing attorneys' fees to be given the prevailing party,

> and was general enough in phrasing to permit the Supreme Court to spell out the breadth of the allowable discretion. Rule 54 (d), as this court has reiterated, leaves less discretion to the judge to deny costs, and has long been interpreted by this and other federal courts as to the particular elements to be considered in exercise of the trial court's discretion. And we agree with the en banc Third Circuit that Title VII carved out no blanket exception from Rule 54(d) as that rule now stands. *Croker v. Boeing Co.* (3rd Cir.1981) 662 F.2d 975, 998 . The wording and structure of Title VII indicate no such exclusion - nor does 54(d) or any other rule. We should therefore apply the normal principle that later-passed legislation must be read to harmonize with the federal rules if that is at all feasible.
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> The result is that Rule 54(d) applies to this Title VII case, the district court's discretion was confined to special circumstances almost wholly related to some fault by the prevailing party (absent here), and it is insufficient that the losing plaintiff had a reasonable basis for her case. It is unfortunate that the costs may be large and the losing employee may be hard-pressed to pay them, but we cannot find in those circumstances a good basis for denying costs either under Title VII or under Rule 54(d) as they are now formulated.

(*Delta Air Lines, Inc. v. Colbert* (7th Cir. 1982) 692 F.2d 489, 490-491 [footnotes omitted].)

Likewise, the Second Circuit has held that *Christiansburg* is not applicable to an award of costs to a prevailing defendant in a Title VII action. (*Cosgrove v. Sears, Roebuck & Co.* (1999) 191 F.3d 98.)

The same is true of disability cases brought under the Rehabilitation Act of 1973 (§ 504, 29 U.S.C.A. § 794). In *Martin, supra*, 560 F.3d at 1052, the Ninth Circuit held *Christiansburg* does not apply to disability discrimination claims brought under the Rehabilitation Act or Title VII claims.

This does not only apply to costs, but prevailing defendants in certain civil rights cases can also be entitled to attorney's fees, if the plain language so states. Holding that the plain language of the statute controls, this Court held a prevailing defendant in injunctive proceedings under the Disabled Persons Act is entitled (as a matter of right and without regard to *Christiansburg*) to recover attorney's fees, affirming the order that the plaintiff pay $118,458, in fees to the prevailing defendant. (*Jankey v. Song Koo Lee* (2012) 55 Cal.4th 1038, 1042, 1045-1047.) Despite the clear civil rights protected by the Disabled Persons Act, this Court held the plain language of the statute makes an award of attorney's fees to a prevailing defendant mandatory. (*Id.* at 1046.)

The Legislature has the ability to express where it wants to exempt a plaintiff from the obligation to pay a prevailing defendant ordinary costs as required under Sections 1032 and 1033.5 or to alter the standard, under which costs are awarded. The Legislature has not done this in FEHA cases or in other important consumer and civil rights statutes. The Legislative

policies and language set forth in the costs statues must be respected and adhered to.

IV. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be affirmed. The will of the Legislature, as stated in Sections 1032, 1033.5, and 12965(b) must be respected. The Chino Valley Independent Fire District, after years of litigation with Williams, should be able to perfect its statutory right as the prevailing party, to an award of $5,368.88 in costs.

Dated: February 5, 2014

LIEBERT CASSIDY WHITMORE

By: _____

Peter J. Brown
Judith S. Islas
Attorneys for Respondent CHINO VALLEY INDEPENDENT FIRE DISTRICT

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed Respondent's Brief on the Merits is produced using 13-point Roman type including footnotes and consists of exactly 13,888 words, exclusive of tables and this certificate, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 5, 2014 LIEBERT CASSIDY WHITMORE

By: _____

Peter J. Brown
Judith S. Islas
Attorneys for Respondent CHINO VALLEY INDEPENDENT FIRE DISTRICT

CERTIFICATE OF SERVICE BY MAIL

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the above-entitled cause. My business address is 550 West C Street, Suite 620, San Diego, CA 92101.

On the below executed date, I served upon the interested parties in this action the following described document(s):

RESPONDENT'S BRIEF ON THE MERITS

by causing it to be mailed by a method of overnight delivery with instructions for delivery the next business day with delivery fees paid or provided for by placing a copy thereof for collection and delivery by overnight courier service, in the course of ordinary business on February 6, 2014, enclosed in a sealed envelope addressed as follows:

David M. deRubertis Helen U. Kim The DeRubertis Law Firm, APC 4219 Coldwater Canyon Avenue Studio City, CA 91604	*Attorneys for Plaintiff/Appellant* (1 copy)
Norman Pine Pine & Pine 14156 Magnolia Boulevard Sherman Oaks, CA 91423	*Co-Counsel and Attorneys for Plaintiff/Appellant* (1 copy)
Clerk of the Court San Bernardino County Superior Court (for Hon. Janet M. Frangie) 8303 Haven Avenue Rancho Cucamonga, CA 91730	(1 copy)
Clerk of the Court Court of Appeal Fourth Appellate District, Division Two 3389 Twelfth Street Riverside, CA 92501	(1 copy)

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 6, 2014, at San Diego, California.

Phyllis Tucker

Phyllis Tucker