No. 17-150

In the Supreme Court of the United States

TUTOR PERINI CORPORATION,
Petitioner,

v.

CITY OF LOS ANGELES,
a municipal corporation (acting by and through its Department of Airports), *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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I. Introduction

Currently, in the federal and state courts within the United States Court of Appeals for the **Ninth Circuit**, a property owner **may** now for the first time seek indemnity and/or contribution against a contractor for personal injuries alleged by members of the public arising out of violations of the Americans With Disabilities Act ("ADA"). At the same time, in the federal and state courts within the United States Court of Appeals for the **Fourth Circuit** and elsewhere, the property owner **may not** seek the same indemnity and/or contribution for ADA related against a contractor for personal injuries alleged by members of the public for those same violations. While Respondent City of Los Angeles ("Respondent") attempts in its opposition to reframe the decisions of these circuit courts, the result remains the same with the circuits split.

In Respondent's opposition, Respondent to a large extent argues the merits of the legal dispute rather than presenting reasons why the petition should be granted. The Respondent's opposition demonstrates precisely why this Court should grant the writ of certiorari. In arguing that the Ninth Circuit "got it right", the Respondent highlights the express conflict between the Ninth Circuit Opinion in this case ("Opinion") [App. A:1-25.][1] and the Fourth Circuit's decision in *Equal Rights Center v. Niles Bolton*

[1] References to "App." refers to the appendix filed concurrently with the Petition on July 25, 2017.

Associates, 602 F.3d 597, 23 A.D. Cases 152 (4th Cir. 2010) ("*Equal Rights*"). There can be no question that *Equal Rights* held that state law claims for breach of contract, indemnification ***and contribution*** under the ADA are barred by the doctrine of "obstacle" or conflict preemption. And, state and federal courts have already followed the *Equal Rights* court's ruling to hold claims for indemnification and contribution barred under circumstances identical to those in the instant case. The Ninth Circuit's ruling conflicts with the *Equal Rights* case in that it expressly permits an ADA defendant to sue a third party for contribution (regardless of the label on the cause of action asserted by the third-party plaintiff). In doing so, the Ninth Circuit injects uncertainty into ADA jurisprudence, and the result will be that lawsuits presenting materially the courts depending upon the circuit in which the case was filed will decide identical circumstances differently. This split has national implications and affects contracts worth billions of dollars annually, complex bidding models, insurance programs and other aspects of a national industry. As a result, this Court should grant certiorari to resolve this question definitively.

II. The Ninth Circuit Ruling Directly Conflicts with the Fourth Circuit, which results in a Split of Authority as to whether a Violator of the ADA can Contract Around its Non-Delegable Duty to Comply with the Comprehensive Statutory Scheme.

A. The Fourth Circuit Does Not Allow A Property Owner To Obtain Indemnification or Contribution for Claims Made by Plaintiffs Under the ADA.

In its Opinion, the Ninth Circuit accurately states the holding of *Equal Rights,* as follows:

> "The Fourth Circuit held that the ADA preempted the developer's claim for indemnification, **and further concluded that granting the developer leave to amend to include a claim for contribution would be futile, because any contribution claim would be a de facto indemnification claim, and thus similarly preempted.** *Id.* at 602. The Equal Rights Center court found that obstacle preemption, which is a subset of conflict preemption, applied to the claims there at issue. *Id.* at 601–02. It explained that the purpose of the ADA is "regulatory rather than compensatory," and that therefore "denying indemnification encourages the reasonable care required by the [federal statute]." *Id.* It further emphasized the nondelegable nature of responsibility under the ADA, pursuant to which 'an owner cannot insulate himself from liability for discrimination in regard to living premises owned by him and managed for his benefit

> merely by relinquishing the responsibility for preventing such discrimination to another party.' *Id.* at 602" (internal quotation marks and ellipsis omitted) [App. A:12-13.]

Thus, the *Equal Rights* decision held contribution claims are barred under the ADA because such claims, as de-facto indemnity claims, pose the same obstacles to accomplishment of the ADA's purposes as do traditional indemnity claims.

The Ninth Circuit attempts to avoid the compelling logic of the *Equal Rights'* decision by construing the Respondent's claim for indemnification as a "de facto claim for contribution" and by arguing that in seeking indemnification only to the extent of Appellant Tutor Perini Corporation's ("Appellant") own acts and omissions, the Respondent is not seeking to avoid liability for its own failures to comply with the ADA. This is a distinction without a difference for several reasons. First, here, the Respondent does seek to impose upon contractors the full obligation to pay damages to plaintiffs and to remedy the ADA violations. [App. F:46-59.] Second, Congressional policy behind refusing to permit property owners to delegate their non-delegable duties to ensure ADA compliance is not furthered if the decision to permit contribution claims depends upon the precise wording of the ADA plaintiff's complaint. Under the Ninth Circuit analysis, a claim in which the ADA plaintiff sues the Respondent for the Respondent's failure to comply with ADA, would not be subject to contribution, whereas a claim in which the ADA plaintiff merely alleged the property itself is non-complaint with the ADA would be subject to contribution. *See* Opinion (distinguishing *Independent*

Living Center of Southern California, et al. v. City of Los Angeles, California, et al., ("*Independent Living*"), 973 F. Supp. 2d 1139, 1148 (C.D. Cal. 2013). [App. A:14-15.] Stated another way, the Respondent may escape liability for its failure to comply with the ADA so long as it contracts out all of its obligations under the ADA and/or the ADA plaintiff merely sues on the basis of the non-compliance of the ***property*** with the ADA, rather than the failures of the property owner to comply with the ADA. The results in the two cases are arbitrary and would violate the Congressional policy behind requiring all property owners to ensure compliance with the ADA. This type of analysis injects uncertainty into every building contract, as the property owner, designer and contractor are unable to measure their potential liability for errors in ADA compliance depending upon the nature of the wording of the potential ADA plaintiff's claim.[2]

B. Numerous courts have cited *Equal Rights* and held claims (whether styled as state law breach of contract, indemnity or contribution) under federal statutory schemes as preempted.

In practice, the Fourth Circuit decision precludes both indemnity and contribution claims. *Equal Rights*

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[2] It is difficult to imagine a property owner, particularly a large public entity such as the City of Los Angeles, contracting for the erection of a public work in which the owner is somehow absent from the project or somehow unable to ensure compliance with the ADA and other statutes. In practice, the public entity conducts extensive design review of all plans and specifications and inspects all of the contractor's work in exacting detail before closing the project.

has been cited by numerous federal and state courts for the proposition that state law claims for breach of contract, indemnity ***and contribution*** are preempted by exhaustive federal statutory schemes such as the ADA. *See Chicago Housing Authority v. DeStefano and Partners, Ltd.,* 45 N.E.3d 767, 771 (Ill. App. Ct. 2015), *reh'g denied (Jan. 19, 2016)*, *appeal denied*, 50 N.E.3d 1138 (Ill. 2016) ("Allowing CHA to seek indemnification from defendant effectively would insulate it from liability. Such an outcome is contrary to the goal of the ADA of preventing and remedying discrimination against disabled individuals. Because allowing the state-law claim would interfere with Congress' goal, CHA's breach of contract claim is preempted under the obstacle preemption doctrine"); *Rolf Jensen & Associates v. Dist. Ct.,* 128 Nev. Adv. Op. 42 (282 P.3d 743, 751) (Nev. 2012) (A close reading of Mandalay's third amended complaint reveals that each of its claims and requested damages derive solely from its first-party liability for its admitted violations of the ADA; such claims breach of contract, breach of express warranty, and negligent misrepresentation are de facto claims for indemnification and thus are preempted by the ADA); *Equal Rights Center v. Archstone Smith Trust,* 603 F. Supp. 2d 814, 824 (D.Md.2009) ("[I]ndemnification is antithetical to Congress' purpose in enacting the FHA and the ADA."); *United States v. Murphy Development, LLC,* No. 3:08–0960, 2009 WL 3614829, at *2 (M.D.Tenn. Oct. 27, 2009) ("[A]llowing recovery under state law for indemnity and/or contribution would frustrate the achievement of Congress' purposes in adopting the FHA and the ADA."); *Miami Valley Fair Housing Center, Inc. v. Campus Village Wright State, LLC* (S.D. Ohio, Sept. 26, 2012, No. 3:10CV00230) 2012 WL 4473236, at *9

("Accordingly, because the FHA does not authorize Campus Village Cross Claimants' express or implied claims for indemnification or contribution, Campus Village Cross–Claimants may not point the finger of their FHA liability, if any, at C+R." citing *inter alia*, *Equal Rights*).

In *United States v. The Bryan Co.*, No. 3:11–CV–302–CWR–LRA, 2012 WL 2051861, at *5 (S.D. Miss. Jun. 6, 2012), cited by the Ninth Circuit in its Opinion [App. A:15.], the Court noted:

> "As one district court wrote, the federal courts to consider this issue are in universal agreement that there is no express or implied right to indemnity or contribution under the FHA or ADA. *Citing inter alia Quality Built Constr., Inc.,* 309 F.Supp.2d at 778–779 (applying *Northwest Airlines, Inc. v. Transportation Workers of Am.,* 451 U.S. 77 (1981)); *United States v. Shanrie Co.,* 610 F.Supp.2d 958, 960–961 (S.D.Ill.2009); *Mathis v. United Homes, LLC,* 607 F.Supp.2d 411, 421–423 (E.D.N.Y.2009); *Equal Rights Ctr. v. Archstone Smith Trust,* 603 F.Supp.2d 814, 821–822 (D.Md.2009); *Sentell v. RPM Mgt. Co.,* 2009 WL 2601367 at *4 (E.D.Ark. Aug. 24, 2009); *Gambone Bros. Dev. Co.,* 2008 WL 4410093 at *7–9; *Access 4 All, Inc. v. Trump Int'l Hotel and Tower Condominium,* 2007 WL 633951 at *6–7 (S.D.N.Y. Feb. 26, 2007)…."Likewise, there is no right to indemnity and/or contribution under the ADA." *Id. Citing Equal Rights Ctr.,* 603 F.Supp.2d at 822.); *Feltenstein v. City School District of New Rochelle* (S.D.N.Y., Dec. 18,

> 2015, No. 14-CV-7494 (CS)) 2015 WL 10097519, at *3 ("This Court agrees with *Access 4 All*'s suggestion that the ADA preempts state law indemnification and contribution, and therefore aligns itself with the considerable weight of authority finding that the purpose of the ADA[5] – the remedial scheme for which does not include provisions for indemnification and contribution – would be frustrated by the availability of such remedies under state law, because it would contravene Congress' intent to hold accountable all who actually violate the terms of the statute. (citations)."

These cases demonstrate that the ruling in *Equal Rights* has been accepted by numerous other courts as setting forth the rule that the ADA preempt state law claims for indemnity ***and contribution***. As such, any argument by Respondent that the Fourth Circuit is not in conflict with the Ninth Circuit is without merit.

In sum, there is a split of authority between the circuits, which will result in parties in different areas of the country facing different rules in complying with national law.

III. The Policy Rationale for Refusing to Allow Indemnification And/Or Contribution to Property Owners for Compliance With The ADA Would be Frustrated by Allowing Contribution.

As discussed above, numerous federal and state courts consistently have held that state-law causes of action seeking recovery of costs incurred for noncompliance with federal accessibility standards are

preempted and barred whether the actions are styled as indemnity, contribution, or breach of contract claims. Consistent with Congressional intent, the courts have reasoned, rightfully so, that permitting an owner to proceed with its state-law breach of contract, indemnity and/or contribution claims would discourage the owner from fulfilling its own obligations to prevent discrimination under Section 504 and the ADA, directly undermining the goal and purpose expressed by Congress in enacting those statutes. *See Equal Rights.* In so finding, the Fourth Circuit stated that "compliance with the ADA and FHA,. . .], is nondelegable in that an owner cannot insulate himself from liability for… discrimination in regard to living premises owned by him and managed for his benefit merely by relinquishing the responsibility for preventing such discrimination to another party." The *Equal Rights* court continued its explanation by stating, "[a]llowing an ADA or FHA violation through contract diminishes its incentive to ensure compliance with discrimination laws. If a developer … who concededly has a non-delegable duty to comply with the ADA and FHA, can be indemnified under state law for its ADA and FHA violations, then the developer will not be accountable for discriminatory practices…. Such a result is antithetical to the purposes of the FHA and ADA." *Id.*

Here, Respondent attempts the exact sort of ADA compliance responsibility-shifting over which the courts have expressed their concern. In this case, the contractor built the project in accordance with Respondent approved plans and specifications. The Respondent inspected and accepted the project as completed, put it to use, and permitted the warranties

to expire. If the Respondent was at all concerned about ADA compliance in the project, it had ample opportunity to demand corrections from the contractually responsible design and construction professionals during their performance of their contracts and warranty periods. This would have been the time for the Respondent to carry out its non-delegable duty to ensure compliance, as this was also the time that such compliance would ensure that the protections of the ADA would ensure to disabled individuals utilizing the premises. The Respondent then had the opportunity to sue contractors for failure to construct ADA compliant buildings and other structures, or to order fixes to existing structures. It did not do so. Rather, it waited for many years, and only after an ADA plaintiff filed suit for alleged injuries, it sought to obtain full indemnification for those injuries. Thus, this case illustrates exactly how a property owner, believing it has a right to indemnity (or contribution), is disincentivized to ensure its property is fully in compliance with the ADA before disabled persons protected by the ADA use its public facility. At a minimum Respondent has a non-delegable duty to contract for the design and construction of a project that complies with the ADA. Respondent also has a non-delegable duty to administer its contracts competently to ensure that its architect and contractor perform as required and design and construct the Respondent's project in compliance with the ADA before the Respondent opens its project to public use permitting the Respondent to recover under state law claims of indemnity or contribution for an *ADA plaintiff's damages* sometimes long after Respondent's own claims for enforcement of contract or warranty claims are barred by applicable

limitations periods, in fact, will disincentivize property owners from conscientiously contracting for ADA compliance and then diligently enforcing its contracts with design professionals and contractors to ensure an ADA compliant project before the project is used by members of the public. An owner has no incentive to timely enforce its contracts requiring compliance with the ADA if he or she can always seek indemnity or contribution for an ADA plaintiff's injuries from a contractor or architect that is "primarily" responsible. The Supreme Court should restore the proper incentives to all property owners to ensure their properties fully comply with the ADA by reversing the Ninth Circuit.

A. Congress Clearly Did Not Provide A Right of Indemnity and/or Contribution in the ADA.

Moreover, it was Congress, not the Ninth Circuit that was charged with developing the public policy under the ADA, a comprehensive civil rights statutory scheme. In this case, congressional intent is clear. The ADA's express purpose is to provide "a clear and comprehensive national mandate" and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," and to "ensure that the Federal Government plays a central role in enforcing the standards." 42 U.S.C. § 12101(b). The ADA **does not** include language to provide for indemnity to contribution. When Congress has intended to provide for a right of contribution in a regulatory statute, it has done so expressly. *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO,* 451 U.S. 77, 91, fn. 24 (1981). Here, there is no such language and therefore no right for the Ninth

Circuit to provide this new remedy that permits property owners to shift risk to others and lowering their incentive to keep the property compliant. As the ADA was passed after this Court's decision in *Northwest*, one can only conclude that Congress elected not to provide such rights.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the questions raised in the Petition.

Respectfully submitted,

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