No. 17-150

IN THE
Supreme Court of the United States

TUTOR PERINI CORPORATION,
Petitioner,

v.

CITY OF LOS ANGELES,
a municipal corporation, et al.,
Respondents.

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

BRIEF FOR RESPONDENT AECOM SERVICES, INC. IN SUPPORT OF CERTIORARI

CHARLES C. LIFLAND
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
SAMANTHA M. GOLDSTEIN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Respondent

QUESTION PRESENTED

Invoking "the sweep of [its] congressional authority," Congress enacted the Americans with Disabilities Act ("ADA") and the Rehabilitation Act with the express purpose of providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §§ 12101(b)(1), (b)(4). To that end, Congress imposed on property owners a non-delegable duty to ensure that their facilities comply with the "clear, strong, consistent, [and] enforceable" anti-discrimination standards enshrined in those federal civil rights statutes. *Id.* § 12101(b)(2).

The question presented is whether the ADA and the Rehabilitation Act preempt a state-law indemnification claim that would allow a property owner subject to the statutes to delay compliance and shift compliance costs to third parties.

RULE 29.6 DISCLOSURE STATEMENT

The ultimate corporate parent of respondent AECOM Services, Inc., is AECOM, a publicly-traded entity. FMR LLC owns more than ten percent of AECOM's stock.

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INTRODUCTION AND INTEREST OF RESPONDENT AECOM SERVICES, INC.

Two physically disabled individuals filed suit against the City of Los Angeles ("City"), alleging that the City's FlyAway bus facility failed to meet the accessibility standards set forth in Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131 *et seq.*, and § 504 of the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.* The City, in turn, filed a third-party complaint against AECOM Services, Inc. ("AECOM") and Tutor Perini Corporation ("Tutor Perini"), whose predecessors-in-interest had long ago provided architectural and construction services for the FlyAway facility. According to the City, AECOM and Tutor Perini are obligated to defend, indemnify, and hold the City harmless from and against the disabled individuals' suit. The district court dismissed the City's third-party complaint, holding that the ADA and the Rehabilitation Act preempt the City's claims. The Ninth Circuit reversed. Tutor Perini now petitions this Court for a writ of certiorari. AECOM, like Tutor Perini, was a third-party defendant and appellee below, and is therefore a respondent here under Supreme Court Rule 12.6. Pursuant to that Rule, AECOM submits this brief in support of Tutor Perini's petition.[1]

REASONS FOR GRANTING THE PETITION

This case presents an urgent and important question regarding the ability of property owners to avoid

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[1] As required by Rule 12.6, AECOM provided notice to the parties on August 16, 2017, of its intent to file this brief in support of the petition.

their congressionally-imposed responsibility for ensuring that their properties comply with federal anti-discrimination statutes: Do Title II of the ADA and § 504 of the Rehabilitation Act preempt an owner's state-law claims for indemnity and contribution from a third-party?[2] The question is the subject of a square and acknowledged conflict. Its nationwide importance is indisputable. And the Ninth Circuit resolved the question incorrectly, to the detriment of the very individuals the ADA and Rehabilitation Act were enacted to protect. AECOM thus agrees with Tutor Perini that this Court should grant review.

I. THERE IS A SQUARE CIRCUIT CONFLICT

As Tutor Perini's petition explains (Pet. 7, 13-16), the question presented implicates a genuine and broad conflict in authority that only this Court can resolve.

Courts across the country have now reached diametrically opposing answers to the important federal question at issue here. In this case, the Ninth Circuit held that the ADA and the Rehabilitation Act do not preempt a property owner's state-law claims for indemnification. That holding enables the property owner to shift its non-delegable duty to comply with those federal civil rights statutes to other entities.

By contrast, every other court to have addressed the question has held that those statutes preempt state-law claims for indemnification and contribu-

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[2] The parties agree that, for preemption purposes, "there is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act." App. 21 (quotation omitted).

tion. In *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597 (4th Cir. 2010), for example, the Fourth Circuit held that the ADA preempted a state-law claim for indemnity, explaining that allowing an owner to shirk its federal-law obligations via indemnification would be "antithetical" to the remedial and preventive purposes of the ADA. *Id.* at 602.[3] And in *Rolf Jensen & Associates v. District Court*, 282 P.3d 743 (Nev. 2012), the Supreme Court of Nevada held that the ADA preempted a resort's state-law claims for indemnification and breach of contract. To conclude otherwise, the court explained, would permit the owner to "circumvent responsibility" for its ADA violations, thereby "lessen[ing] the owner's incentive to ensure compliance with the ADA" and thus contravening the purpose of the statute. *Id.* at 748; *see Indep. Living Ctr. of S. Cal. v. City of L.A.*, 973 F. Supp. 2d 1139, 1158-61 (C.D. Cal. 2013) (municipalities' state-law cross-claims for contribution and in-

[3] The Ninth Circuit here tried to distinguish the Fourth Circuit's decision in *Equal Rights Center* by misreading the City's third-party complaint as having sought only contribution, not indemnification. *See* Pet. 14 (citing App. 24). But that supposed distinction does nothing to diminish the split of authority that the Ninth Circuit's decision in this case created. For one thing, other courts besides the Fourth Circuit have held that the ADA preempts *both* indemnification *and* contribution claims. *See, e.g.*, *United States v. Murphy Dev., LLC*, 2009 WL 3614829, at *2 (M.D. Tenn. Oct. 27, 2009). The distinction, moreover, makes no difference—the Ninth Circuit's reasoning about preemption of contribution claims conflicts equally with the Fourth Circuit's rationale for holding indemnification claims preempted. In any event, the City's third-party complaint is focused solely on indemnification—it makes "no mention of contribution or comparative fault principles" whatsoever. Pet. 14 (citing App. 46-61).

demnity preempted by ADA and Rehabilitation Act); *United States v. Bryan Co.*, 2012 WL 2051861, at *5 (S.D. Miss. June 6, 2012) (permitting indemnification of ADA violations "would frustrate, disturb, interfere with, or seriously compromise the purposes of the ADA" (quotation omitted)); *United States v. Murphy Dev., LLC*, 2009 WL 3614829, at *2 (M.D. Tenn. Oct. 27, 2009) (third-party plaintiffs' state-law claims for indemnity and contribution preempted, "because allowing recovery under state law for indemnity and/or contribution would frustrate the achievement of Congress' purposes in adopting … the ADA"); *Access 4 All, Inc. v. Trump Int'l Hotel & Tower Condo.*, 2007 WL 633951, at *6-7 (S.D.N.Y. Feb. 26, 2007) (no right to indemnification because even if right existed under state law, "it would raise the specter … [of] pre-empt[ion] by the extensive remedial scheme of the ADA"); *Chi. Hous. Auth. v. DeStefano & Partners, Ltd.*, 45 N.E.3d 767, 775-76 (Ill. App. Ct. 2015) (housing authority's state-law indemnity claim preempted by ADA and Rehabilitation Act because allowing claim "effectively would insulate [authority] from liability" and thereby contravene ADA's goal of "preventing and remedying discrimination against disabled individuals").

Given this square conflict, the preemptive scope of two important federal statutes—the ADA and the Rehabilitation Act—now turns on where those statutes are being applied. In some places, the owner of a property can shift to a third party responsibility for the owner's violations of its own non-delegable duty to comply with the ADA and the Rehabilitation Act. In other places, the owner cannot escape that responsibility. There is no reason, let alone a persua-

sive one, why the same federal statute should apply differently in different places.

The Ninth Circuit's disagreement with the Nevada Supreme Court creates an especially untenable situation for litigants in Nevada. Unless and until this Court steps in, parties' rights in Nevada will depend on whether their cases are decided, like this one, in federal court, or instead mere minutes away in state court. All of this disuniformity and uncertainty is unacceptable. Certiorari should be granted.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

As Tutor Perini has shown (Pet. 8, 25-26), the implications of the conflict in authority extend far beyond the dispute in this case. The question at issue impacts "thousands of projects and hundreds of millions of dollars in disputes between contractors and public entities." Pet. 8. And courts' disagreement over the question is sowing confusion in the national construction industry. *Id.* As a result of the Ninth Circuit's decision, for example, "owners, contractors[,] and designers in different jurisdictions" are subject "to different rules and standards" under the same federal statutes, based simply upon where a particular property or project is located. *Id.* Owners, contractors, and designers, moreover, often have properties in different states and localities, and provide services and work on projects across jurisdictions. *Id.* at 25. The application of different legal rules in different jurisdictions is bad enough, but it is even worse where, as here, the economic ramifications of the disparate legal rules are severe. *See id.* at 26.

Such "uneven enforcement" of federal law would be troubling in any case, *id.* at 8, but it is especially problematic vis-à-vis the anti-discrimination statutes at issue here, *see id.* at 26. Congress's explicit intent in enacting the ADA and the Rehabilitation Act was to provide "clear, strong, consistent, [and] enforceable standards." 42 U.S.C. § 12101(b)(2). Congress also sought to ensure that the federal government would "play[] a central role in enforcing [them]." *Id.* § 12101(b)(3). Absent this Court's intervention, the Ninth Circuit's decision will contravene Congress's objectives in two respects: it will impose the wrong legal rule throughout the Ninth Circuit (except in Nevada state-court cases), *see infra* Section III, and it will create severe disuniformity rather than the "clear" and "consistent" standards Congress sought to establish, Pet. 26. This case thus implicates not only a broad judicial conflict, but a conflict on an issue of substantial national significance.

III. THE NINTH CIRCUIT'S DECISION IS INCORRECT

The Ninth Circuit's decision is wrong, and its error is especially detrimental to the very individuals the ADA and the Rehabilitation Act were enacted to protect. *Id.* at 17-25.

Implied obstacle preemption arises when a "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quotation omitted). Indeed, even where "the ultimate goal of both federal and state law is the same," the state law will be "pre-

empted if it interferes with the *methods* by which the federal statute was designed to reach that goal." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992) (emphasis added) (quotations omitted). The City's state-law claims are impliedly preempted by the ADA and Rehabilitation Act here because they present both problems: they conflict with the statutes' anti-discrimination objectives, and they interfere with the mechanisms Congress established to achieve those objectives.

Congress "invoke[d] the sweep of [its] authority" when it enacted the ADA, which was expressly aimed at providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §§ 12101(b)(1), (b)(4). A key component of that mandate is the anti-discrimination rules imposed by the statute on those who own or operate public accommodations. *See id.* § 12182(a). The ADA's mandate is conclusive: Congress did not provide owners and operators of public accommodations with an escape valve by allowing them to seek indemnification or contribution from third parties. Pet. 18.

Congress's decision to exclude such a remedy should resolve the question of preemption here. *See id.* at 17-22. In *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981), this Court concluded that the omission of a right to indemnification or contribution in a "comprehensive … remedial scheme" "strongly evidences an intent" to preclude such a right. *Id.* at 93-94. It is inappropriate, the Court emphasized, "to amend [a] comprehensive enforcement scheme[] by adding to [it] another private remedy not authorized by

Congress." *Id.* at 94. Significantly, the ADA was enacted after *Northwest Airlines* was decided, and this Court "generally presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *see Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986) ("Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme."); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives … know the law.").

Congress's omission of an indemnification/contribution right is especially telling in the context of an anti-discrimination statute, because as numerous courts have recognized, shifting responsibility for statutory violations is "antithetical" to the fundamental purposes of such statutes. *Equal Rights Ctr.*, 602 F.3d at 602.[4] Indemnification or

[4] *See Bowers v. NCAA*, 346 F.3d 402, 418-34 (3d Cir. 2003) (no right to contribution under Title II of ADA or § 504 of Rehabilitation Act); *United States v. Gambone Bros. Dev. Co.*, 2008 WL 4410093, at *8 (E.D. Pa. Sept. 25, 2008) (Congress's failure to provide contribution or indemnity remedy in Fair Housing Act "raise[d] the presumption that Congress deliberately intended that each co-defendant have a non-indemnifiable, non-delegable duty to comply with the [Act]"); *United States v. Shanrie Co.*, 610 F. Supp. 2d 958, 961 (S.D. Ill. 2009) (same); *Mathis v. United Homes, LLC*, 607 F. Supp. 2d 411, 422-23 (E.D.N.Y. 2003) (same); *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 779 (E.D.N.C. 2003) (de facto indemnification claims for Fair Housing Act violations impermissible, because allowing defendant to seek indemnity from third party "would run counter to the purpose of the [Act]

contribution rights diminish owners' incentives to ensure both their own and others' compliance with the law. Pet. 13-14 (citing *Equal Rights Ctr.*, 602 F.3d at 602); *see Mathis v. United Homes, LLC*, 607 F. Supp. 2d 411, 425 (E.D.N.Y. 2003) (no right to contribution or indemnification under Civil Rights Act because "Congress did not intend to provide defendants, i.e., those who allegedly discriminated against persons protected by the … Act[], with any rights to alleviate the liabilities resulting from their discriminatory conduct"). The ADA and the Rehabilitation Act aim not only to *remedy* discrimination against individuals with disabilities, but also to *prevent* it in the first place. *See* 42 U.S.C. § 12101(b). But because indemnification and contribution claims generally do not accrue until a loss materializes, such claims allow owners to ignore noncompliance for years, secure in the knowledge that if and when liability is established, the responsibility will be borne by the third party. Owners thus "would have little incentive to self-test to discover potential violations during the planning and construction phases." *Bryan Co.*, 2012 WL 2051861, at *5. Prevention of ADA violations is "more likely encouraged by widespread knowledge that … owners remain independently responsible for compliance with federal law, and they should therefore check their architects' and contractors' work before and during construction." *Id.*[5]

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and undermine [its] regulatory goal by allowing the [defendant] to escape any liability for violating the Act").

[5] In the Ninth Circuit's view, allowing state-law contribution claims would promote the ADA's goals by effectively making another entity—the contractor—accountable under the

Permitting owners to shirk responsibility for ADA and Rehabilitation Act compliance by filing state-law indemnification and contribution claims against third-parties will harm the disabled individuals that those federal statutes were enacted to protect in other ways, too. For example, such claims will dramatically increase the cost, complexity, and time required for disabled individuals to litigate ADA and Rehabilitation Act cases in the future. The statutes, as properly understood, require a disabled plaintiff only to bring suit against the owner or operator of a non-compliant facility, and to litigate the sole issue of whether the property complies with those statutes' requirements, as simply and expeditiously as possible. If state-law indemnification and contribution claims are allowed, however, owner- and operator-defendants will file cross-claims against their contractors, and them upon their subcontractors, and so on, imposing serious burdens on the civil rights plaintiffs. For this reason, courts have recognized that reading indemnity or contribution rights "into federal statutes to protect the persons regulated by the statute" generally comes "at the expense of the persons protected by the statute." *Mathis*, 607 F. Supp. 2d at 424 (citing *Nw. Airlines*, 451 U.S. at 91-92). Unless and until the decision of the Ninth Circuit is reversed, disabled persons with-

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statute. Pet. App. 13-14. The policy judgment reflected in the statute's remedial scheme, however, is that incentives for compliance should rest directly and entirely on the entities that actually own or operate the accommodation. If and when Congress makes a different policy judgment, it can add to the statute's remedial scheme either a direct claim against a contractor or an indirect indemnification/contribution claim. It is not the office of federal courts to amend statutes tacitly.

in the Ninth Circuit will suffer all of these harms in seeking to vindicate their rights, directly contravening Congress's intent in enacting the ADA and the Rehabilitation Act to provide "clear, strong, consistent, [and] enforceable" anti-discrimination standards nationwide. 42 U.S.C. § 12101(b)(2).

CONCLUSION

For the foregoing reasons, and for the reasons stated by Tutor Perini, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES C. LIFLAND
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
SAMANTHA M. GOLDSTEIN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Respondent

August 28, 2017