No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should resolve a split among the Circuit courts by rejecting the Ninth Circuit's finding that the Americans with Disabilities Act and Section 504 of the Rehabilitation Act do *not* preempt a property owner's state law claim for contribution against third-party contractors, thereby enabling the owner to shift its non-delegable duty to comply with these federal civil rights statutes.

2. In enacting the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, did Congress evince a legislative intent to preclude a state law cause of action of indemnity in favor of an owner of a facility found to be in violation of the ADA as suggested by this Court's holding in *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 93-94, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioner is Tutor Perini Corporation ("TPC" or "Tutor Perini"), a publicly traded corporation formed under Massachusetts law with its principal place of business in California. TPC was a third-party-defendant and appellee below.

Respondent is City of Los Angeles, ("City") a municipal corporation in California, who was third-party-plaintiff and appellant below.

Respondent AECOM Services, Inc. ("AECOM") was third-party-defendant and appellee below.

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The Opinion of the United States Court of Appeals for the Ninth Circuit, entitled *City of Los Angeles v. AECOM Services, Inc*., et al., No. 15-56606, decided on April 24, 2017, is reported at 854 F.3d 1149 (9th Cir. 2017) and included in the appendix attached hereto as Appendix A: 1-25. This Opinion reversed the Judgment entered by the United States District Court for the Central District of California on October 8, 2015 in accordance with an Order of Dismissal entered on April 1, 2015.

The Order of the Ninth Circuit denying TPC's Motion for Rehearing En Banc on June 1, 2017, is included in the appendix attached hereto as Appendix E: 44-45

The Judgment entered on October 8, 2015 is included in the appendix attached hereto as Appendix C: 24-26.

The Order of Dismissal entered on April 1, 2015 is included in the appendix attached hereto as Appendix D: 31-43.

JURISDICTION

The United States District Court for the Central District of California originally had jurisdiction pursuant to 28 U.S.C. Sections 1331 and 1367. The District Court entered Judgment in favor of Petitioner Tutor Perini and against Respondent on October 8, 2015 in accordance with an Order of Dismissal entered on April 1, 2015. Respondent City of Los Angeles appealed the Judgment to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C.

Section 1291 and the Judgment was reversed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2) states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Americans with Disabilities Act of 1990 (42 U.S.C. § 12101) states:

(a) Findings

The Congress finds that—

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities,

and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior

status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the

> standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

The Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The Americans with Disabilities Act of 1990 (42 U.S.C. § 12182(a)) states:

> (a) General rule
>
> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)) states:

> (a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service

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INTRODUCTION

This Court should grant this Petition for a Writ of Certiorari to resolve a split of authority among the Circuit Courts, to address a ruling by the United States Court of Appeals for the Ninth Circuit that disregards prior precedent from this Supreme Court, and to resolve a national concern between the business community and local government.

The question in this case is whether an owner of a public works improvement project can shift financial responsibility for its non-delegable duty to comply with the Americans with Disability Act ("ADA") and Section 504 of the Rehabilitation Act of 1973, to a contractor hired by that public owner to assist with the construction of the public project through an indemnification provision in a contract written contract between them, and do these federal civil rights statutes preempt the owner's state law

claims of contractual indemnification against the contractor.

Before the United States Court of Appeals for the Ninth Circuit ruled in this case, every single court that has reviewed this issue, including the United States Court of Appeals for the Fourth Circuit, answered the question in favor of contractors. In this case, the District Court, concurring with multiple lower courts and the Fourth Circuit – the only circuit to have previously decided this issue – agreed with Appellee that there is no right to seek indemnity from contractors for ADA violations. The Ninth Circuit ruled differently.

This Court should review the decision, as the Ninth Circuit's decision dramatically changes the law, as instituted by Congress, and contradicts legal interpretations issued by this Court and multiple lower courts.

First, there is now a genuine split of authority that only this Court can resolve. A final ruling from the Ninth Circuit against Petitioner would contradict: (1) the ruling by the Fourth Circuit Court of Appeals – the only circuit having ruled on this issue - in *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597, 23 A.D. Cases 152 (4th Cir. 2010), (2) rulings by the Central District of California, including in *Independent Living Center of Southern California v. City of Los Angeles*, 973 F. Supp. 2d 1139 (C.D. Cal. 2013), and (3) rulings in a number of state courts. In fact, all published decisions that address the issue have ruled in favor of the position of Petitioner.

Second, upholding the Ninth Circuit decision calls into question precedent from this Court. In *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 93-94, 101 S.Ct. 1571, 67 L. Ed. 2d 750 (1981) ("*Northwest*"), the Supreme Court held that the "comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." The ADA is definitively "comprehensive." The Ninth Circuit's holding disregards *Northwest* and the plain language of the ADA, as it creates a new private remedy of contribution for public entities under Title II and Title III of the ADA even though no such remedy is mentioned or otherwise exists in the ADA.

Third, the split in the circuits creates confusion in the national construction industry by subjecting owners, contractors and designers in different jurisdictions to different rules and standards under the ADA. This decision impacts thousands of projects and hundreds of millions of dollars in disputes between contractors and public entities. This uneven enforcement of the ADA would not only be impractical and illogical, but it would conflict with Congress's explicit intent to have the ADA provide "clear, strong, consistent, enforceable standards." 42 U.S.C. § 12101(b). Upholding the Ninth Circuit would effectively empower owners to shift their statutory liability under the ADA to contractors, designers and other third parties without regard for the potential policy ramifications which Congress carefully considered when it intentionally omitted an owner's right to contribution under the ADA's comprehensive scheme.

Therefore, Petitioner respectfully submits that the United States Supreme Court should review this matter.

STATEMENT OF THE CASE

Two physically-disabled persons ("Plaintiffs") filed the underlying action against Respondent, City of Los Angeles. [Appendix ("App.") F: 47-48.] Respondent City of Los Angeles ("Respondent") is a municipal corporation, a Charter City, and the owner of the Van Nuys Airport and FlyAway bus system at the Van Nuys Airport, California. [App. F: 48-49.]

In their complaint, the Plaintiffs alleged causes of action arising from alleged discrimination of persons with disabilities by Respondent in connection with the facilities of the Van Nuys Airport and FlyAway bus system, including violations of The Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act, and related state claims. [App. D: 33.] The ADA and Section 504 are federal civil rights statutes enacted to protect persons with disabilities from discrimination. The "analysis of a claim for indemnification or contribution under Section 504 of the Rehabilitation Act is equally applicable to a claim under Title II of the ADA." *Independent Living Center of Southern California, et al. v. City of Los Angeles, California, et al*., ("*Independent Living Center*"), 973 F. Supp. 2d 1139, 1148 (C.D. Cal. 2013). Section 11135 of the California Government Code is the state law counterpart of Section 504. *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1113–14 (9th Cir. 1987). The Unruh Civil Rights Act and Disabled

Persons Act are California civil rights statutes which parallel the ADA.[1]

By their operative (first amended) complaint against Respondent Plaintiffs alleged that Respondent allegedly denied Plaintiffs the full and equal enjoyment and benefits of the FlyAway bus system located at Van Nuys Airport in violation of the ADA, Section 504, and the subject related California civil rights statutes protecting disabled individuals from discrimination. [App. D: 33.] Plaintiffs alleged that, among other things, the FlyAway bus terminal at Van Nuys Airport contained architectural defects that deprived persons with mobility impairments like Plaintiffs the ability to use and enjoy the FlyAway bus system and its related facilities fully and equally in violation of the ADA, Section 504, and state civil rights laws prohibiting discrimination against persons with disabilities. [App. D: 33.]

Petitioner Tutor Perini Corporation is a publically traded corporation and national general contractor headquartered in California, whose predecessor, Tutor-Saliba Corporation, provided services in the construction of the FlyAway bus terminal project pursuant to a written contract with Respondent. Pursuant to state law, the contract was competitively

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[1] *Cal. Civil Code* § 51(f) ("A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section."); and *Cal. Civil Code* § 54(c) ("A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section").

bid without negotiation of the contract language. Cal. Pub. Contract Code § 20100, et seq.

In an effort to totally shift its liability arising from Plaintiffs' complaint, Respondent filed a Third-Party Complaint against Petitioner. [App. F: 46-61] Respondent's Third-Party Complaint alleged three causes of action against Petitioner: (1) Breach of Contract; (2) Express Contractual Indemnity; and (3) Declaratory Relief. [App. F: 56-58] The Third-Party complaint did not seek contribution or other causes of action. [App. F: 46-61.] Respondent's Third-Party Complaint referenced two specific sections in the written contract in support of Respondent's claims against Petitioner: (1) Section 12.0 titled, "City Held Harmless"; and (2) Section 20.0, titled, "Compliance With Applicable Laws." [App. F: 50-52.]

Section 12.0 is an indemnification provision which requires Petitioner to expressly defend, indemnify, keep and hold Respondent… "harmless from any and all costs, liability, damage or expense (including costs of suit and fees, and expenses of legal services) claimed by anyone...relating to relating to acts or events to arising from or out of this Contract [e]xcept for the [Respondent's] sole negligence or willful misconduct." [App. F: 52.]

Section 20.0 is a legal compliance provision which requires that Petitioner comply with, among other things, all state and federal laws including the ADA and states that "Contractor (i.e., Petitioner) shall be solely responsible for any and all damages caused, and/or penalties, levied, as the result of Contractor's noncompliance with such enactments." [App. F: 52.]

The Third-Party Complaint alleged that as a result of Petitioner's failures to perform its contractual obligations under contract Sections 12 and 20, Respondent was required to defend against the claims of Plaintiffs and was subject to liability. [App. F: 55] The Third-Party Complaint further alleged that following receipt of Plaintiffs' complaint, Respondent tendered its defense and demand for indemnification to Petitioner pursuant to the contract. [App. F: 55] Respondent's Third-Party Complaint does not contain a cause of action for contribution or comparative fault or any similar claim for apportionment of liability between the parties. [App. F: 46-61] The Third-Party Complaint's prayer for relief also does not contain any request for an apportionment of fault or damages. [App. F: 46-61] Rather, the Third-Party Complaint seeks to have Petitioner and third-party defendants assume all liability and hold Respondent entirely "harmless" for Plaintiffs' claims against Respondent. [App. F: 59]

REASONS FOR GRANTING THE PETITION

As a preliminary matter, the Ninth Circuit held that "[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act." [App. A: 21.]

I. The Ninth Circuit's Opinion Conflicts With The Fourth Circuit's Decision in *Equal Rights Center v. Niles Bolton Associates* and Every Other Court Which Has Ruled On Whether A Defendant May Seek Indemnification Or Contribution From Third Parties Under The ADA.

Every court that has reviewed this issue disagrees with the ruling of the Ninth Circuit Court of Appeal, including the Fourth Circuit, district courts and state courts.

Conflict preemption (aka obstacle preemption) applies "where the state-law claim 'interferes with the methods by which the federal statute was designed to reach [its] goal.'" *Equal Rights Ctr.*, *supra*, 602 F.3d at 601. In *Equal Rights Ctr.*, the Fourth Circuit held that indemnification claims under state law are preempted by the ADA because allowing an owner to seek indemnity against third parties for the owner's violation of a non-delegable duty would undermine the regulatory purposes of the ADA. *Equal Rights Ctr.*, *supra*, 602 F.3d at 601-602. The ADA does not mention indemnification or contribution or otherwise authorize a defendant to shift its liability to other parties. The Fourth Circuit explained that allowing an owner to insulate itself from liability for an ADA violation through contract or other means would frustrate the

intent and purpose of the ADA by diminishing an owner's incentive to comply with the ADA. *Id*. at 602. And because allowing an owner to shift its non-delegable duty would be "antithetical to" the purposes of the ADA, the Fourth Circuit held that the owner's indemnification claim under state law was preempted by the ADA.

Here, Respondent's Third-Party Complaint against Petitioner alleged only three causes of action: (1) Breach of Contract; (2) Express Indemnity; and (3) Declaratory Relief. [App. F: 56-59.] All three causes of action alleged in the Third-Party Complaint sound in contract and sought to have Petitioner defend, indemnify, and hold Respondent entirely harmless based on the Contract between Respondent and Petitioner. [App. F: 59.] This is the exact situation presented in *Equal Rights Ctr.*, *supra*, 602 F.3d at 601-602. where the developer sought to shift its entire ADA liability to a third party. The Ninth Circuit attempted to distinguish *Equal Rights Ctr.* by holding the Respondent is not seeking actually indemnification, but "functionally seeks contribution." [App. A: 24.] However, there is no mention of contribution or comparative fault principles in the Respondent's Third-Party Complaint. [App. F: 46-61.]

The Ninth Circuit's recasting of Respondent's indemnification claim to one of "de facto contribution" does not resolve the conflict among the Circuits and fails to clarify to what extent, *if any*, an owner may insulate itself or shift its own ADA liability by contract or other means to third parties. [App. A: 24.] The Ninth Circuit's manifest error is particularly noteworthy because every other court which has ruled

on this issue has disagreed with the Ninth Circuit's reasoning. Outside of the Ninth Circuit's reasoning in this case, there is universal agreement that there is no right to indemnity or contribution under the ADA or any other "comprehensive" legislative scheme enacted by Congress to protect the civil rights of a particular class including persons with disabilities. *See e.g.*, *Equal Rights Ctr.*, *supra*, 602 F.3d 597; *United States v. The Bryan Co.*, No. 3:11–CV–302–CWR–LRA, 2012 WL 2051861, at *5 (S.D. Miss. Jun. 6, 2012) (permitting indemnification claims for violations of the ADA "would frustrate, 'disturb, interfere with, or seriously compromise the purposes of the' ADA," quoting *Morgan City v. South Louisiana Elec. Co–op.*, 31 F.3d 319, 322 (5th Cir.1994)); *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) (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 and Tower Condominium*, 2007 WL 633951 at * *6–7 (S.D.N.Y. Feb. 26, 2007) (no right to indemnification because even if a right to indemnity for a party's own ADA violations existed under state law, "it would raise the specter that any state-law right to indemnity would be pre-empted by the extensive remedial scheme of the ADA"); *Mathis v. United Homes, LLC*, 607 F. Supp. 2d 411, 422–23 (E.D.N.Y. 2009); *United States v. Shanrie Co.,* 610 F. Supp. 2d 958, 961 (S.D. Ill. 2009); and *United States v. Quality Built Const., Inc.*, 309 F. Supp. 2d 767 (E.D.N.C. 2003).

Similarly, state courts which have considered whether defendant may shift its ADA liability to others also have held that the ADA precludes a non-compliant owner from seeking indemnification under state law. *Rolf Jensen & Associates v. Dist. Ct.*, 128 Nev. Adv. Op. 42, 282 P.3d 743, 749 (2012) (holding no right of indemnification under state law and noting that "[A]s every court to squarely consider this issue has held, the ADA preempts indemnification claims brought by owners for their violations thereof because such claims would pose an obstacle to the ADA"); *Chicago Housing Authority v. DeStefano and Partners, Ltd.*, 45 N.E.3d 767, 775 (2015) ("The failure to include such a remedy [of indemnification] 'raises the presumption that Congress deliberately intended that each co-defendant have a non-indemnifiable, non-delegable duty to comply…'").

The Ninth Circuit's Opinion that the ADA does not preempt state law is entirely unprecedented. It is an outlier that runs counter to every federal and state court decision which addresses this issue. The issuance of a writ is warranted to resolve this conflict among the courts and determine whether the Ninth Circuit's Opinion should be reversed in accordance with the intent of Congress as recognized by every other court to address the same issue.

II. The Ninth Circuit's Opinion Ignores And Conflicts With This Court's Holding in *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, Which Held That The Omission Of A Right To Contribution In A Comprehensive Federal Civil Rights Statute Signifies Congress's Specific Intent To Preclude Such A Right.

The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "Statutory intent on this latter point is determinative." *Id*. "Without it (legislative intent), a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*. at 286-287.

Every preemption analysis "must be guided by two cornerstones of our pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 1194, 173 L. Ed. 2d 51 (2009)). "First, the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id; see also Gade v. National Solid Wastes Management Ass'n* ("*Gade*"), 505 U.S. 88, 96 (1992), quoting *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 208 (1985) ("[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone"). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police

powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, *supra*, 555 U.S. at 565, 129 S. Ct. 1187, 1194–95 (bold added). "**To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute**." *Gade*, *supra*, 505 U.S. at 96 (citation omitted).

In drafting the ADA, Congress could not have made its intent and purpose anymore 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 conspicuously does not provide to "any person who owns, leases (or leases to), or operates a place of public accommodations," that is, the class against whom the ADA is directed, the right or remedy of indemnification or contribution against third parties. 42 U.S.C. § 12182(a). As this Court has previously noted, 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, the Ninth Circuit erroneously ruled that the legislative omission of a remedy to contribution in the ADA's text does not rebut the presumption against preemption. In doing so, the Ninth Circuit ignored the Supreme Court's holding in *Northwest*, which specifically stated the contrary:

> "The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies. It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress." *Northwes*t, *supra*, 451 U.S. 77, 93-94.

The ADA, landmark legislation notably passed after *Northwest* with great bipartisan support, is explicitly and definitively a comprehensive remedial scheme. 42 U.S.C. § 12101(a). "Congress is, of course, presumed to know existing law pertinent to any new legislation it enacts." *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991). The ADA does not make any reference to the remedies of indemnification or contribution. In making a contrary ruling, the Ninth Circuit ignored this Court's holding in *Northwest*. The Ninth Circuit effectively rewrote the ADA for the benefit of Respondent and other owners by creating the new private remedy of "de facto contribution" for owners under Title II and Title III of the ADA even though no such remedy exists under the ADA. The absence of a private remedy in a comprehensive federal statute forecloses courts from creating a remedy deliberately omitted by Congress—even when a party seeking the unauthorized remedy actually belongs to the class of victims which the federal statute was specifically intended to protect. *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir.2002); *Okwu v. McKim*, 682 F.3d 841, 844 (9th Cir.2012). The Ninth Circuit's decision to allow owners such as Respondent to seek contribution from

third parties is contrary to the purposes of the ADA and applicable precedent.

Like the Equal Pay Act and Title VII in *Northwest*, the ADA is a "comprehensive" regulatory scheme with an extensive legislative record. That legislative record indisputably reflects that Congress conducted substantial investigations, research, and hearings to reach its finding that the ADA was necessary to provide "comprehensive" legal protection for disabled persons. 42 U.S.C. § 12101(a). Like the Equal Pay Act and Title VII, the ADA is a "civil rights" bill designed to protect a discrete class of persons who have faced historical discrimination. 42 U.S.C. § 12101(b). Like the defendant employers under the Equal Pay Act and Title VII in *Northwest*, a property owner, such as Respondent is not a member of the class protected the ADA. In fact, Respondent is a member of the very class against whom the ADA is intended to regulate. [42 U.S.C. §§ 12131, 12181; *Northwest*, *supra*, at 92 ("To the contrary, both statutes are expressly directed against employers; Congress intended in these statutes to regulate their conduct for the benefit of employees. In light of this fact, petitioner "can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection".] In such circumstances, "unless [ ] congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.") *Northwest*, *supra*, at 94.

Granting owners such as Respondent a private right to contribution under state law in contravention of a comprehensive regulatory scheme that does not provide

for such a remedy undisputedly interferes with the comprehensive scheme's purpose and goals. Allowing an owner to avoid or substantially mitigate its non-delegable duty under the ADA would defeat the purposes and intent of Congress, which was focused squarely and exclusively on remedying "discrimination against individuals with disabilities […] in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). There is not only no evidence that Congress intended to allow defendants to shift their liability under the ADA to third parties, as this Court held in *Northwes*t, the lack of any reference in the ADA to indemnification or contribution precludes any implication that these remedies exist under the ADA.

Under the ADA, building contractors such as Petitioner are not members of the class against whom the ADA is directed. Notably, even the Ninth Circuit has agreed that designers and contractors may not be sued directly under the ADA. *Lonberg v. Sanborn Theaters Inc*., 259 F.3d 1029, 1036 (9th Cir. 2001) (holding that only an owner, lessee, lessor, or operator of a noncompliant public accommodation can be liable under Title III of the ADA). It was illogical for the Ninth Circuit to find that "only an owner, lessee, lessor, or operator" may be liable under Title III of the ADA in *Lonberg v. Sanborn Theaters Inc*., but that contractors may be subject to cross-claims for contribution by the same owners seeking to shift their non-delegable duty and liability to them. Such a circumstance would conflict with the ADA's plain language and purpose,

Congress's explicit intent, and this Court's holding in *Northwest*.

The Ninth Circuit's Opinion erroneously ignored this Court's holding in *Northwest* that an implied right to contribution does not exist in a comprehensive federal civil rights statute. The ADA, passed after *Northwest*, is explicitly and definitively "comprehensive" and indisputably makes no mention of contribution or indemnification or any other private remedy for the benefit of Respondent and similarly situated defendants. In sum, the Ninth Circuit's finding that the ADA grants Respondents a right to "de facto contribution" is tantamount to a rewriting of the ADA in violation of this Court's holding in *Northwest*.

III. Respondent's Claim Of Contribution Under State Law Is Preempted By The ADA Under The Doctrine Of Conflict Preemption Because Enabling A Non-Compliant Owner To Seek Contribution Against Other Parties Would Interfere With The Specific Methods Prescribed By The ADA And Conflict With The ADA's Stated Purposes.

The Ninth Circuit concluded that the ADA did not preempt state law claims of contribution because allowing such contribution claims purportedly would promote the goals of the ADA by holding culpable contractors accountable. [App. A: 17, 24.] According to the Ninth Circuit, "the entity best situated to ensure full compliance may well be the contractor tasked with designing or constructing the public resource in question, and precluding contract clauses for contribution reduces a contractor's incentive to do so." [App. A: 24.] The Ninth Circuit's reasoning was based

on the Court's policy preference. There is nothing in the ADA's text or legislative history that indicates Congress was concerned with the apportionment of ADA liability. There is nothing in the ADA's text or legislative history that indicates Congress was concerned with which entity was best situated to ensure full compliance.

First, the Ninth Circuit's Opinion is contrary to its own precedent. The Ninth Circuit previously held that designers and contractors may not be held liable under Title III of the ADA. *Lonberg v. Sanborn Theaters Inc.,* 259 F.3d 1029, 1036 (9th Cir. 2001). Here, the Ninth Circuit apparently reversed itself (without expressly saying so) by holding that contractors may be subject to cross-claims for contribution by owners even though "only an owner, lessee, lessor, or operator" may be held liable under Title III of the ADA. *Lonberg v. Sanborn Theaters Inc.,* 259 F.3d at 1036. The Ninth Circuit has essentially created a private remedy for defendant owners against contractors after previously finding (correctly) that Title III of the ADA categorically excluded contractors from ADA liability.

Generally, owners such as Respondent have a minimal, if any, role or responsibility in the design or construction of a facility. The task of designing and constructing any facility invariably falls on architects, engineers and contractors. If owners are empowered to seek contribution from designers and builders, the bulk of financial burden of ADA compliance would be shifted disproportionately to contractors and design professionals. Owners could virtually insulate themselves via contract from all risks and costs of ADA compliance. It would be only Respondent and other

similarly situated owners, who would benefit financially from the right to seek contribution from contractors. The benefit to ADA plaintiffs would be nothing. This new paradigm and shift of liability created by the Ninth Circuit directly conflicts with the ADA's prescribed methods of protecting disabled persons from discrimination without regard to the principles of comparative fault.

There is no indication that Congress intended that the costs of ADA compliance would be apportioned among parties according to their respective level of wrongdoing. The Ninth Circuit cites nothing in the ADA's text or legislative record that indicates Congress was concerned with how the financial burdens of ADA compliance might adversely impact other parties. In fact, the ADA's legislative history reflects the stark opposite: Congress considered how the financial costs of ADA compliance could be apportioned and made no effort to include in the provisions of the ADA the private remedies of indemnification or contribution. [H.R. REP. 101-485(III), (1990) at 50 ("While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole.").)] The Ninth Circuit ignored the methods and policy choices prescribed by Congress in deciding how to redress discrimination against persons with disabilities in a comprehensive manner, and rewrote the statute to add a private remedy which that Court believed would further the ADA's purpose. However well-intentioned, the Opinion of the Ninth Circuit was an intrusion on the legislative prerogative of Congress and substitution of that Ninth Circuit's policy preference for that of

Congress. *Northwest*, *supra*, 451 U.S. at 93-94 ("It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress").

IV. The Issue Of Whether The ADA Preempts An Owner's Remedy Of Contribution Against Third-Party Contractors Under State Law Is A Question Of Exceptional Importance For Which There Is An Overriding Need For a National Legal Standard to Secure Uniformity in the Enforcement of the ADA.

As a result of the Ninth Circuit's Opinion, the Ninth Circuit is now the only circuit – and only court – in the entire country which has held that an implied state law right to contribution may exist for the class or group the ADA expressly targeted even where Congress intentionally omitted such a right in enacting the ADA's comprehensive remedial scheme. Reversal of the Ninth Circuit is warranted for several reasons.

First, there is no logical reason why different circuits and jurisdictions should have different rules governing whether a defendant may seek contribution from other parties for ADA and Section 504 violations and their state law counterparts. Owners and developers often have real estate and projects in different states and localities. Designers, engineers, and contractors, including Petitioner, provide services and work on projects in different circuits. All potential parties: states, municipalities, private owners, designers and contractors alike, should be subject to the same uniform rules and standards under the ADA

as they have an inherent interest in knowing the nature of their duty and extent of their potential liability.

Moreover, the economic ramifications of whether ADA liability may be shifted by an owner, in whole or in part, will be significant for contractors and owners, who often perform work based on the design and specifications provided by the owner or designers retained by the owner. The scope pricing of the contracts are often based on national models. There is no reason to have different rules and standards of liability for different jurisdictions when the ADA's express intent is to provide "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). It would frustrate and defeat the purpose and intended effect of the ADA if contractors and designers in one jurisdiction were immune from contribution claims by an owner under the ADA while contractors in the Ninth Circuit were not. The Ninth Circuit's decision to not apply preemption and allow owners in its jurisdiction to shift their liability to third parties conflicts with the purpose of the ADA and interferes with the specific methods prescribed by the ADA. The creation of different standards for different owners depending on geography materially interferes with the Federal Government's ability to play a central role in enforcing a comprehensive national mandate under a comprehensive federal statutory scheme.

CONCLUSION

For the reasons noted herein, Petitioner respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on April 27, 2017.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56606
D.C. No. 2:13-cv-04057-SJO-PJW

[Filed April 24, 2017]

CITY OF LOS ANGELES, a municipal corporation (acting by and through its Department of Airports), *Third-Party-Plaintiff-Appellant*,	)
v.	)
AECOM SERVICES, INC.; TUTOR PERINI CORPORATION, *Third-Party-Defendants-Appellees*,	)
and	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES; JAROTH, INC., *Third-Party-Defendants.*	)

OPINION

Appeal from the United States District Court
For the Central District of California
S. James Otero, District Judge, Presiding

App. 2

Argued and Submitted April 5, 2017
Pasadena, California

Filed April 24, 2017

Before: MILAN D. SMITH, JR. and N.R. SMITH, Circuit Judges, and GARY FEINERMAN, District Judge.[*]

Opinion by Judge Milan D. Smith, Jr.

SUMMARY[**]

Disability Law / Preemption

The panel reversed the district court's dismissal of third-party claims brought by the City of Los Angeles for breach of contract and contribution against contractors that allegedly breached their contractual duty to perform services in compliance with federal disability regulations.

Two disabled individuals filed suit alleging that the City's FlyAway bus facility and service failed to meet federal and state accessibility standards. The City filed a third-party complaint alleging breach of contract by the companies hired to design and construct the bus facility.

The panel held that Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act did not preempt the City's state-law claims. The panel held

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[*] The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that field preemption did not apply because the ADA expressly disavows preemptive federal occupation of the disability-rights field. Distinguishing a Fourth Circuit case, the panel held that conflict preemption also did not preclude the City's claims. The panel disagreed with the district court's conclusion that the states have not traditionally occupied the field of anti-discrimination law, and so the general presumption against preemption did not apply. Applying the presumption, the panel concluded that Congress did not indicate a clear and manifest purpose to preempt claims for state-law indemnification or contribution filed by a public entity against a contractor. The panel remanded the case for further proceedings.

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Christine Van Aken, Chief of Appellate Litigation; Dennis J. Herrera, City Attorney; City Attorney's Office, San Francisco, California; for Amici Curiae

League of California Cities and California Association of Joint Powers Authorities.

OPINION

M. SMITH, Circuit Judge:

This appeal presents a single legal question that has not yet been addressed by our court: Do Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (§ 504) preempt a city's state-law claims for breach of contract and *de facto* contribution against contractors who breach their contractual duty to perform services in compliance with federal disability regulations? For the reasons set forth in this opinion, we hold that neither Title II nor § 504 preempts such claims.

FACTUAL AND PROCEDURAL BACKGROUND

Two disabled individuals filed suit against Appellant City of Los Angeles (the City), alleging that the City's FlyAway bus facility and service—a bus system that provides transportation between Los Angeles International Airport and various locations—failed to meet the accessibility standards set forth in Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.*; § 504 of the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*; and various California statutes. The complaint specifically alleged that the FlyAway bus facility in Van Nuys, California, had been constructed in such a manner that it was inaccessible by disabled individuals. Plaintiffs sought damages, attorneys' fees, and an injunction requiring the City to modify its Van Nuys FlyAway facility so that it would become

compliant with state and federal disability access standards.

The City subsequently filed a third-party complaint against Appellees AECOM Services, Inc. (AECOM) and Tutor Perini Corporation (Tutor).[1] The City's third-party complaint alleged that pursuant to the contract entered into by the City and the company hired to design and construct the Van Nuys FlyAway facility (which was AECOM's predecessor-in-interest), AECOM was obligated "to defend, indemnify, and hold harmless the City against all suits, claims, losses, demands, and expenses *to the extent that any such claim results from the negligent and/or intentional wrongful acts or omissions of [AECOM]*, its subcontractors, officers, agents, servants, [or] employees." (emphasis added). The complaint also tracked the language of the contract, pursuant to which AECOM's predecessor-in-interest agreed

> to defend, indemnify and hold City . . . harmless from and against all suits and causes of action, claims, losses, demands and expenses . . . to the extent that any claim for personal injury and/or for property damage results from the negligent and/or the intentional wrongful acts or omissions of Consultant, its subcontractors of any tier, and its or their officers, agents, servants, or employees, successors or assigns.

(emphasis added).

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[1] The City also named two other companies as third-party defendants, but neither of those entities is a party to this appeal.

The City further alleged that Tutor, the successor-in-interest to another company retained by the City to construct the Van Nuys FlyAway facility, was contractually obligated "to defend, indemnify, and hold harmless the City against all costs, liability, damage or expense . . . sustained as a proximate result of the acts or omissions of [Tutor] or relating to acts or events pertaining to, or arising out of, the contract." The contract between the City and Tutor's predecessor-in-interest also required that the contractor, in performing its contractual obligations, "comply with all applicable present and/or future local, . . . State and Federal Laws, statutes, ordinances, rules, regulations, restrictions and/or orders, including . . . the Americans with Disabilities Act of 1990," and stated that "Contractor shall be solely responsible for any and all damages caused, and/or penalties levied, as the result of Contractor's noncompliance with such enactments." The contract also stated that

> [e]xcept for the City's sole negligence or willful misconduct, Contractor expressly agrees to . . . defend, indemnify, keep and hold City . . . harmless from any and all costs, liability, damage or expense . . . sustained as a proximate result of the acts or omissions of Contractor, its agents, servants, subcontractors, employees or invitees; or [] relating to acts or events pertaining to, or arising from or out of, this Contract.

Based on the foregoing contractual provisions between the City and Appellees' respective predecessors-in-interest, the City's third-party complaint against Appellees sought damages for breach

of contract, express contractual indemnity, and declaratory relief establishing Appellees' obligations to defend and indemnify the City.

Tutor moved to dismiss the City's claims pursuant to Federal Rule of Civil Procedure 12(b)(6), on the theory that Title II and § 504 preempt the City's claims for indemnification. The district court granted Tutor's motion to dismiss on preemption grounds. The district court also denied the City's request for leave to amend its complaint, because it believed that any potential amendment would be futile. The City and AECOM then stipulated that the district court could rule on the viability of the City's claims against AECOM on the same basis as it did on Tutor's motion to dismiss because AECOM had asserted an identical preemption defense. The district court subsequently dismissed the City's claims against AECOM in an order substantively identical to the order previously issued in regard to Tutor's motion to dismiss. The City now appeals the district court's dismissal of its third-party claims against Appellees.

JURISDICTION AND STANDARD OF REVIEW

The district court entered a final judgment as to all parties in this appeal on October 8, 2015. We have jurisdiction over final judgments of the district court pursuant to 28 U.S.C. § 1291. We review *de novo* a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 317 (9th Cir. 2017). We similarly review *de novo* questions of preemption under the Supremacy Clause. *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005).

ANALYSIS

I. The Americans with Disabilities Act and the Rehabilitation Act of 1973

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. This echoes § 504 of the Rehabilitation Act, which states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Title II "extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act of 1973] to all actions of state and local governments," H.R. Rep. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367, and should be read "broadly in order to effectively implement the ADA's fundamental purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1172 (9th Cir. 2002) (internal quotation marks and alteration omitted). In the context of claims brought under Title II, "the ADA's broad language brings within its scope anything a public entity does." *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (internal quotation marks omitted).

II. Federal Preemption of State Law

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supreme Court has set forth two principles to guide courts in applying the federal preemption principle embodied in this constitutional provision. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and alteration omitted). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (internal quotation marks and ellipsis omitted); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

We have recognized three ways in which a federal law may preempt state legislation:

> First, Congress may preempt state law by so stating in express terms. Second, preemption may be inferred when federal regulation in a particular field is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. In such cases of field preemption, the mere volume and

> complexity of federal regulations demonstrate an implicit congressional intent to displace all state law. Third, preemption may be implied when state law actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Bank of Am. v. City & Cty. of S.F., 309 F.3d 551, 558 (9th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (Dec. 20, 2002) (internal quotation marks and citations omitted).

The Supreme Court has stated, in the context of banking regulations, that the general presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 108 (2000). Taken in isolation, this language might suggest that any time the federal government has historically regulated in a given area, the typical presumption against preemption does not apply. However, the Court, in *Wyeth v. Levine*, 555 U.S. 555 (2009), somewhat cabined its language from *Locke* by further explaining the role of historic federal regulation in conducting a preemption analysis:

> Wyeth argues that the presumption against pre-emption should not apply to this case because the Federal Government has regulated drug labeling for more than a century. That argument misunderstands the principle: We rely on the presumption because respect for the States as "independent sovereigns in our federal system"

> leads us to assume that "Congress does not cavalierly pre-empt state-law causes of action." *Lohr*, 518 U.S. at 485 . . . . The presumption thus accounts for the historic presence of state law but *does not rely on the absence of federal regulation*.

Id. at 565 n.3 (emphasis added). *Locke*'s assertion that the presumption against preemption will not apply "where there has been a history of significant federal presence" must therefore be considered in conjunction with the specific circumstances attendant to banking regulations, and particularly the fact that in *Locke*, a state had "enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic." *Locke*, 529 U.S. at 99. The Supreme Court found a wholly different situation in *Wyeth*, and, although Congress had enacted a "significant public health law" as early as 1906, the Court nevertheless recognized public health and safety as a realm in which the presumption applies. 555 U.S. at 565–66, 565 n.3.

III. Neither Title II nor Section 504 Preempts State-Law Claims for Contribution

Neither Title II nor § 504 contains a statement of express preemption, and no party in this appeal contends otherwise. The district court's opinion suggests, however, that field preemption applies to preclude Appellant's claims. We disagree. Field preemption occurs "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation," or "where the field is one in which the federal interest is so dominant that the federal system will be assumed to preclude

enforcement of state laws on the same subject." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (internal quotation marks omitted). Title II specifically states that "[n]othing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of . . . any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. § 12201(b). In other words, the ADA expressly disavows preemptive federal occupation of the disability-rights field.

Nevertheless, we may affirm on any basis finding support in the record, and Appellees contend—as they did before the district court—that conflict preemption precludes the City's claims. Appellees' argument rests largely upon the Fourth Circuit Court of Appeals' decision in *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597 (4th Cir. 2010). That case concerned a housing developer that filed crossclaims for implied and express contractual indemnification against the architect of its properties, seeking damages stemming from those properties' failure to comply with, *inter alia*, the ADA's disability accessibility requirements. *See id*. at 599. 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).

As an initial matter, the factual circumstances of *Equal Rights Center* materially differ from those in this appeal. Most importantly, the *Equal Rights Center* court emphasized that the developer "sought to allocate the *full* risk of loss to [the architect] for the apartment buildings at issue," and determined that "[a]llowing an owner to *completely insulate* itself [in that manner] from liability for an ADA or FHA violation through contract [would] diminish[] its incentive to ensure compliance with discrimination laws." *Id*. (emphases added). Here, by contrast, the relevant contractual provisions assign liability to Appellees only to the extent that their own actions give rise to liability. Thus, the *Equal Rights Center* court's concern with permitting a responsible party to completely insulate itself from Title II liability is not in play here. On the contrary, under the present circumstances, the greater concern is the potential for contractors to shield themselves from any liability they caused under both state contract law and federal disability regulations if

Title II and § 504 are found to preempt Appellant's claims.[2]

Furthermore, while the developer in *Equal Rights Center* sought leave to amend to add a claim for contribution, the Fourth Circuit affirmed the district court's denial on the ground that the developer "really [sought] to have [the architect] pay *all* damages," and that any such claim would therefore be a "*de facto* claim for indemnification." 602 F.3d at 602, 604. Because the so-called contribution claim really constituted a claim for indemnification, the court declined to reach the question of whether a genuine state-law claim for contribution would be preempted. *See id*. at 604 n.2.[3]

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[2] We acknowledge that were we to find state-law contribution claims preempted, future plaintiffs could still elect to bring suit directly against the contracting parties. We also acknowledge, however, that as a practical matter, it will often be the public-facing municipal entity that provides the most attractive target for litigation. That is precisely what happened here.

[3] Notably, in *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989), a case upon which the *Equal Rights Center* court relied heavily for its preemption analysis, the Fourth Circuit held that federal securities law preempted claims for indemnification, but that it did *not* similarly preempt claims for contribution. *Id*. at 1108.

In the present case, we do not view the labels of "indemnification" or "contribution" as dispositive of the analysis. Here, though the City may seek "indemnification" for a contractor's wrong-doing, that compensation only constitutes a portion of the City's total liability under federal disability statutes. In other words, the relief sought may be complete indemnification from the perspective of the *contractor's* liability; but it constitutes only partial contribution from the perspective of the *City's* liability exposure.

Appellees also cite *Independent Living Center v. City of Los Angeles*, 973 F. Supp. 2d 1139 (C.D. Cal. 2013) in support of their preemption argument. That district court case concerned a suit for Title II and § 504 liability against the City of Los Angeles, and various owners of residential properties in the City of Los Angeles that received federal funds from or through the City, for having engaged in a "'pattern or practice' of discrimination against people with disabilities in violation of federal and state anti-discrimination laws." *Id.* at 1142. The City crossclaimed for express and implied contribution or indemnity against the property owners. *Id*. at 1143. The property owners moved to dismiss the City's crossclaims. *Id*. The district court found that no cause of action for implied contribution or indemnification exists under Title II or § 504. *Id*. at 1154, 1156. The district court also determined that state-law indemnity and contribution claims posed an obstacle to the full implementation of Title II and § 504, and that they were accordingly preempted. *Id*. at 1160. It reasoned "that congressional objectives are best served when parties with duties under the antidiscrimination statutes remain independently responsible for compliance," and held that "allowing public entities regulated by Section 504 and Title II to seek indemnification or contribution through state law to offset their liability would interfere with the methods by which the federal statutes were designed to reach their goal." *Id*. (internal alterations and quotation marks omitted). The court further held that the City's contractual indemnity crossclaim derived from the first-party claims under the ADA and FHA, citing *Equal Rights Center* for the proposition that such claims present an impermissible attempt to contract

around the nondelegable nature of a party's duties under the ADA and FHA, and that permitting those claims would therefore undermine federal law. *Id*. at 1161. The *Independent Living Center* court rested its analysis regarding contract claim preemption wholly on *Equal Rights Center*, and did not discuss any difference between claims seeking contractual contribution, and those seeking indemnity. *Id*. We are, of course, not bound in any way by *Independent Living Center,* but we address its reasoning in this opinion as part of our analysis.

The district court in this case declined to address two aspects of *Independent Living Center* that cabin its persuasive effect on the present appeal. First, as the *Independent Living Center* court emphasized, the first-party plaintiffs in that matter alleged that the City had "failed . . . to maintain *policies, practices, or procedures* to ensure that accessible housing units [were] made available and [were] meaningfully accessible to people with disabilities," and that they additionally "*failed to monitor compliance* with the Rehabilitation Act accessibility requirements." *Id*. at 1144–45 (internal quotation marks omitted, emphases added). The court expressly found that "the main focus of [the] lawsuit [was] the legality of the overall housing program," and that "Plaintiffs did not file this case because a particular building violated provisions under the various statutes." *Id*. at 1148 (internal alterations omitted). Rather, the plaintiffs sought redress for a programmatic failure on the part of the City to maintain adequate policies and oversight under the relevant federal statutes. *See id*. at 1148–49.

That factual circumstance stands in stark contrast to the situation presented by this appeal. Cities implement policies and procedures as part of their standard operation. Were courts to permit a city to contract away its liability to implement policies and procedures that comply with federal disability regulations, they would indeed be permitting delegation of an entity's duties under the ADA. Here, however, the City does not seek indemnification or contribution for damages arising out of its own failure to implement policies or exercise oversight. Rather, it seeks redress for specific construction and design failures related to the FlyAway bus service. Cities usually have no choice but to contract out design and construction of public facilities because they do not have the expertise, personnel, or equipment necessary to construct public projects. They delegate that task by necessity. Accordingly, an important component in a city's doing all it can to fulfill its duties under Title II and § 504 is to require as part of its contracts with necessary third party entities that the requirements of those statutes be met.[4] Permitting enforcement of

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[4] In considering the actions for which Title II intends to impose liability on a public entity, we have previously framed the question in terms of the "outputs" of a public entity:

> Consider, for example, how a Parks Department would answer the question, "What are the services, programs, and activities of the Parks Department?" It might answer, "We operate a swimming pool; we lead nature walks; we maintain playgrounds." It would not answer, "We buy lawnmowers and hire people to operate them." The latter is a means to deliver the services, programs, and activities of the hypothetical Parks Department, but it is not itself a service, program, or activity of the Parks Department.

contract claims seeking to hold a contractor liable for duties necessarily delegated to it does not raise the specter of entirely insulating public entities from ongoing Title II or § 504 liability posed by offloading all the city's responsibilities under those laws.

Second, although it found that conflict preemption precluded the City's claims for both contribution and indemnification, the *Independent Living Center* court relies almost entirely on *Equal Rights Center*—a case that expressly declined to address whether conflict preemption would apply to claims for contribution, as opposed to those for indemnification. *See Indep. Living Ctr.*, 973 F. Supp. 2d at 1160–61. *Independent Living Center* expresses a clear concern regarding attempts to shift a responsible party's liability under federal

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Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1174 (9th Cir. 1999) (emphases added). In line with this analysis, the *Zimmerman* court found that the defendant Parks Department was not liable under Title II for employment discrimination, because employment is not a "service, program, or activity" of a public entity within the meaning of Title II, which relates to public services. *Id.*; *see also Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (framing analysis of the scope of Title II as asking whether a given activity constitutes "a normal function of a governmental entity").

Though *Zimmerman* was not a preemption case, its analysis is instructive insofar as it considered Congress' intention for the scope of actions falling under Title II. Preemption analysis focuses, first and foremost, on congressional intent. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016). If one frames the scope of Title II as encompassing a public entity's outputs, this supports the notion that Congress did not intend to preempt claims for liability arising from tasks that a City does not—and in many cases simply cannot—do itself, but must instead contract with others to provide the service.

disability statutes to another party, and accordingly explains how permitting express contractual indemnification claims poses an obstacle to the regulatory purpose of the ADA. It does not, however, explain how permitting claims for contribution commensurate with a third-party's own wrongdoing would pose a similar obstacle.

As discussed *supra*, analysis under the Supremacy Clause begins with a presumption against preemption, "unless [preemption] was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485. The *Independent Living Center* court held that "the presumption against preemption is inapplicable [to the ADA], because the states have not traditionally occupied the field of anti-discrimination law." 973 F. Supp. 2d at 1157. We disagree with this characterization of the historical legal landscape, and we believe the district court erred in concluding that the presumption against preemption is inapplicable to claims brought under Title II of the ADA.

In *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir. 1996), we observed that "[p]rivate causes of action against state actors who impair federal civil rights have not been traditionally relegated to state law." However, the mere co-existence of state and federal causes of action does not support a rejection of the presumption. *See Wyeth*, 555 U.S. at 565 n.3. Similarly, the fact that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs," and that its "enactment of the ADA represents its judgment that there should be a comprehensive national mandate for the elimination of

discrimination against individuals with disabilities," 973 F. Supp. 2d at 1158, does not render the presumption against preemption inapplicable. As the Supreme Court has explained, the presumption is rooted in federalism concerns. *See, e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *see also Wyeth*, 555 U.S. at 565 n.3; *id.* at 583–87 (Thomas, J., concurring in the judgment). The relevant question is whether a given area is one in which states have historically had the power to regulate, not whether states have previously regulated in the precise manner or to the degree that the federal government has itself chosen to regulate. *See Wyeth*, 555 U.S. at 565, 565 n.3. Indeed, if state and federal regulatory choices perfectly aligned, there would be no cause for federal legislation at all. Conversely, if the presumption against preemption failed to apply anytime federal regulations add something to state legislation, the presumption would be a nullity.

States have historically regulated in the area of civil rights generally, and in the field of discrimination against disabled individuals specifically. *See, e.g., Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 365, 368 n.5 (2001) ("It is worth noting that by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures [against disability discrimination]."); *see also Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 33 (1948) (noting that "many states" had at that time enacted civil rights statutes); *Rodriguez v. Barrita, Inc.*, 10 F. Supp. 3d 1062, 1073 (N.D. Cal. 2014) ("Long before Congress passed the ADA, California enacted several statutes to prohibit disability discrimination at the state level."). We therefore apply the presumption against preemption,

and, accordingly, will find preemption only if Congress indicated a "clear and manifest purpose" to that effect. *Nation v. City of Glendale*, 804 F.3d 1292, 1298 (9th Cir. 2015).

Obstacle preemption applies when a given "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) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id*. Accordingly, whether claims for express contractual indemnification or contribution conflict with Title II and § 504 requires consideration of those statutes' animating purposes and intended consequences.

Congress expressly set forth the purpose of Title II as "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" through "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)–(2). We have noted that "[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act." *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (listing cases); *see also Weinreich v. L.A. Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997) ("Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act.").

Nothing in Title II or § 504 addresses claims for state-law indemnification or contribution filed by a public entity against a contractor. In *Equal Rights Center*, the Fourth Circuit drew on its reasoning in *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989), to nevertheless find contractual indemnification precluded. It explained that

> In holding the indemnification claim [in *Baker, Watts & Co.*] preempted, we analyzed whether the claim represented an obstacle to the regulatory goals of the federal law. We explained that "Congress ha[d] not provided a right to indemnification in the federal securities laws under any circumstances." Furthermore, we emphasized the total nature of a claim for indemnity, concluding that "it would run counter to the basic policy of the federal securities laws to allow a securities wrongdoer . . . to shift its *entire* responsibility for federal violations on the basis of a collateral state action for indemnification." As we explained, "[t]he goal of the 1933 and 1934 Acts is preventive as well as remedial, and 'denying indemnification encourages the reasonable care required by the federal securities provisions.'"

Equal Rights Ctr., 602 F.3d at 601 (internal citations omitted). To the extent that this analysis relies on congressional *omission* of a federal cause of action for indemnification, it turns the presumption against preemption on its head. The basic premise of the presumption is that absent an affirmative indication to the contrary, a federal regulation will not preempt

state law. The failure to provide a federal analogue to a state-law cause of action does not meet this standard.

Any concern that a public entity will be able to contract out of Title II or § 504 compliance makes sense in the context of indemnification for an entity's failure to maintain appropriate policies and practices—in other words, for its failure to take action solely within its control, as was arguably the case in *Equal Rights Center*. Permitting a shift of liability to a party lacking the power to remedy the violation would frustrate the federal statutes' regulatory purpose. As we have stated in the Title III context of landlords and lessees,

> a covered entity may not use a contractual provision to reduce any of its obligations under [the ADA] . . . . [A] public accommodation's obligations are not extended or changed in any manner by virtue of its lease with the other entity. H.R.Rep. No. 101-485(II), at 104, *reprinted in* 1990 U.S.C.C.A.N. 303, 387. The legislative history [of the ADA] confirms that a landlord has an independent obligation to comply with the ADA that may not be eliminated by contract.

Botosan v. Paul McNally Realty, 216 F.3d 827, 833 (9th Cir. 2000). This principle applies equally to Title II's requirements for public services. Crucially, however, the third-party claims asserted by the City against Appellees do not seek to shift liability in such a manner.

Unlike the crossclaims at issue in *Equal Rights Center*, the City's third-party claim seeks only to collect for violations arising out of *Appellees' own negligence or*

wrongdoing. In this sense, though styled as a claim for "indemnification," the City functionally seeks contribution from Appellees. Allowing the City to seek redress for liability incurred by virtue of a third-party contractor's actions does not plausibly pose an obstacle to the intended purpose and effect of Title II or § 504. Rather, finding such claims precluded would itself hamper the statutes' regulatory purpose. The most a public entity may be able to do in furtherance of its duties under the respective acts may, in many situations, be to expressly contract for compliance (contractual provisions for which it will potentially have to pay a premium to the contractor). From there, the entity best situated to ensure full compliance may well be the contractor tasked with designing or constructing the public resource in question, and precluding contract clauses for contribution reduces a contractor's incentives to do so. *Cf. Baker, Watts & Co.*, 876 F.2d at 1107 (finding indemnification claims preempted by federal securities law, but stating that "Congress did not remove it from the power of a state to conclude that a state right to *contribution* would further the regulatory purposes of the federal securities laws by holding all violators to account." (emphasis added)).

In sum, neither Title II of the ADA nor § 504 of the Rehabilitation Act preempt the City's state-law claims for *de facto* contribution, however styled, against Appellees.

CONCLUSION

For the reasons set forth in this opinion, we REVERSE the district court's order dismissing the City's third-party claims, and REMAND for further proceedings consistent with this opinion.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56606
D.C. No. 2:13-cv-04057-SJO-PJW

[Filed May 9, 2017]

CITY OF LOS ANGELES, a municipal corporation (acting by and through its Department of Airports), *Third-Party-Plaintiff-Appellant*,	)
v.	)
AECOM SERVICES, INC.; TUTOR PERINI CORPORATION, *Third-Party-Defendants-Appellees*,	)
and	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES; JAROTH, INC., *Third-Party-Defendants.*	)

App. 27

Filed May 9, 2017

Before: MILAN D. SMITH, JR. and N.R. SMITH, Circuit Judges, and GARY FEINERMAN, District Judge.[*]

ORDER

The Opinion filed in this matter on April 24, 2016, is hereby amended as follows: On page 5, line 3, "design and construct" is replaced with "provide design and construction administrative support services for."

[*] The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV13-4057 SJO (PJWx)

[Filed October 8, 2015]

ALVIN MALAVE and JULIO OCHOA, individuals,
Plaintiffs,

vs.

CITY OF LOS ANGELES and BAUER INTELLIGENT TRANSPORTATION, INC. a California Corporation,
Defendants.

CITY OF LOS ANGELES, a municipal corporation,
Third-Party Plaintiff,

vs.

AECOM SERVICES, INC. TUTOR PERINI CORPORATION; BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES; and JAROTH, INC.,
Third-Party Defendants.

[~~PROPOSED~~] JUDGMENT

The Court, having on April 1, 2015, entered an order granting third-party defendant Tutor Perini Corporation's motion to dismiss the third-party cross-complaint of defendant and third-party plaintiff City of Los Angeles ("City") without leave to amend; having on July 6, 2015, granted the motion to dismiss third-party cross-complaint by third-party defendant AECOM Services, Inc. ("AECOM") without leave to amend, pursuant to the stipulation between the City and AECOM; having on July 27, 2015, dismissed the underlying action of Alvin Malave and Julio Ochoa ("Plaintiffs") with prejudice, retaining jurisdiction over the action for the limited purpose of enforcing the terms of the previously-entered consent decree for injunctive relief between Plaintiffs and Bauer Intelligent Transportation, Inc. and Plaintiffs' settlement agreement with defendant City and otherwise retaining jurisdiction ofthe City's third-party complaint; having on July 28, 2015, dismissed the City's third-party complaint against third-party defendant Jaroth, Inc. ("Jaroth") with prejudice, pursuant to the stipulation of the City and Jaroth; and having on September 16, 2015, entered an order and amended minute order sua sponte dismissing the City's third-party complaint for lack of subject matter jurisdiction as to remaining claims, it is hereby ordered, adjudged and decreed as follows: The court has now resolved all claims as to all parties, and there being no remaining claims before the court, the court hereby enters final judgment pursuant to Rule 54, Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: October 8, 2015

/s/ S. James Otero
Hon. S. James Otero
United States District Judge

Submitted By:

Michael N. Feuer, City Attorney
Raymond S. Ilgunas, General Counsel
Kerrin Tso, Deputy City Attorney
OFFICE OF THE LOS ANGELES CITY ATTORNEY

By: /s/ Kerrin Tso
Kerrin Tso
Attorneys for Defendant and
Third-Party Plaintiff
CITY OF LOS ANGELES

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO.: CV 13-04057 SJO (PJWx)

[Filed April 1, 2015]

CIVIL MINUTES - GENERAL

DATE: April 1, 2015
TITLE: Alvin Malave et al. v. City of Los Angeles et al.

PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz	Not Present
Courtroom Clerk	Court Reporter

COUNSEL PRESENT FOR PLAINTIFFS:
Not Present

COUNSEL PRESENT FOR DEFENDANTS:
Not Present

PROCEEDINGS (in chambers): ORDER GRANTING THIRD-PARTY DEFENDANT TUTOR PERINI CORPORATION'S MOTION TO DISMISS THIRD PARTY COMPLAINT [Docket No. 56]

This matter comes before the Court on Third Party Defendant Tutor Perini Corporation's ("Tutor Perini") Motion to Dismiss the Third Party Complaint ("Motion"), filed February 24, 2015. Third Party

Plaintiff City of Los Angeles (the "City") filed an Opposition to the Motion ("Opposition") on March 9, 2015, to which Tutor Perini filed a Reply on March 16, 2015.[1] The Court found this matter suitable for disposition without oral argument and vacated the hearing set for March 30, 2015. *See* Fed. R. Civ. P. 78(b). For the reasons stated below, the Court **GRANTS** the Motion.

I. FACTUAL AND PROCEDURAL HISTORY

The First Amended Complaint alleges the following. Los Angeles World Airports ("LAWA") is a department of Defendant City of Los Angeles which owns and operates the three major airports in the greater Los Angeles area, including Los Angeles International Airport ("LAX"). (First Am. Compl. ("FAC") ¶ 1, ECF No. 35.) The City, through LAWA, also operates the FlyAway Bus Service ("FlyAway"), a bus system that offers regularly-scheduled, round-trip service, between LAX and FlyAway shuttle stops at Union Station in downtown Los Angeles, Westwood in West Los Angeles, and Van Nuys in the San Fernando Valley. (FAC ¶ 2.) No reservations are required to use the FlyAway. (FAC ¶ 2.) Plaintiffs Alvin Malave and Julio Ochoa ("Plaintiffs") are individuals with physical disabilities as defined by the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12102, the Department of Justice regulations implementing the ADA, 28 C.F.R.

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[1] The Court notes that Tutor Perini's reply is nine pages long, whereas the Court's Initial Standing Order limits reply briefs to five pages. The Court will consider Tutor Perini's reply in this instance, but reminds Tutor Perini to adhere to the page limits in future filings.

§ 36.104, and Cal. Gov't Code § 12926. (FAC ¶ 4.) Due to spinal cord injuries, Plaintiffs are unable to stand or walk independently and require the use of a wheelchair at all times for mobility. (FAC ¶ 4.)

Plaintiffs allege that the City has violated the ADA, the Rehabilitation Act of 1973, and related California laws by: (1) excluding wheelchair users from participation in, or denying them the benefits of, the Fly Away bus service due to their disabilities; (2) purchasing, leasing, or soliciting for purchase or lease buses for the FlyAway service that are not readily accessible to and useable by people who use wheelchairs; (3) contracting with a private entity to supply busses that are not accessible to wheelchair users; (4) failing to make modifications to policies and practices to avoid discrimination on the basis of disability in the administration of the Fly Away service; (5) failing to ensure that its contract holder, Defendant Bauer's Intelligent Transportation ("Bauer's") maintains accessible features on the Fly Away buses; and (6) failing to ensure that Bauer's ensures that its personnel are trained so that they are able to operate vehicles and equipment in a manner that ensures full and equal access to disabled patrons. (FAC ¶ 6.) Plaintiffs further allege that the City has failed to construct and/or alter the Fly Away bus terminal in Van Nuys, a public transportation facility, so that it is readily accessible to and useable by persons with disabilities. (FAC ¶ 6.) Plaintiffs also allege that Bauer's has violated the ADA in a number of respects. (FAC ¶ 7.) Plaintiffs seek both injunctive and compensatory relief. (FAC ¶ 8.)

Plaintiffs allege that both of them have frequently used the FlyAway bus service and encountered difficulties in doing so due to their disabilities. (*See* FAC ¶¶ 18-26.) Further, Plaintiffs allege that there are architectural barriers at the FlyAway terminal located at 7610 Woodley Avenue in Van Nuys and owned by the City. (FAC ¶ 27.) Plaintiffs allege that these barriers are in violation of the access-related standards and codes set forth under 49 C.F.R. part 37.45 and that these barriers deprive persons with mobility impairments, like Plaintiffs, access to the FlyAway service. (FAC ¶ 27.) In particular, Plaintiffs allege the following barriers in the FAC:

> There are approximately 16 designated accessible parking spaces in the uncovered parking lot on the east side of the Terminal building. These parking spaces and their corresponding access aisles each have slopes in excess of 2% (the maximum allowable slope), rendering them difficult or dangerous for persons with mobility impairments to use. Further, these 16 designated accessible parking spaces all have incorrect signage and identification.
>
> The path of travel from the designated accessible parking spaces in the uncovered parking lot on the east side of the Terminal building to the Terminal building entrance has cross-slopes in excess of 2% (the maximum allowable cross-slope) in multiple areas, rendering it difficult or dangerous for persons with mobility impairments to use.

> The covered parking garage on the east side of the Terminal building has 5 levels and provides designated accessible parking spaces on each level. Each of the parking spaces is improperly configured so that they are too narrow, and each of the parking spaces has slopes in the space and corresponding access aisle in excess of 2% (the maximum allowable slope), rendering them difficult or dangerous for persons with mobility disabilities to use.
>
> There are two paths of travel provided to the Terminal building from the public right of way at Woodley Avenue. The northernmost path of travel is dangerous and inaccessible to wheelchair users due to excessive slopes and cross-slopes in the path of travel, curb ramps that are improperly configured, and lack of any features of an accessible ramp (such as handrails). On information and belief, there is a second path of travel further south that is more accessible to wheelchair users. However, this southern path of travel is inadequately signed and marked, making it difficult to locate. The inadequate signage creates the possibility that persons with disabilities will use the inaccessible path of travel on the north side, which may lead to difficulty, discomfort, and serious injury.

(FAC ¶ 27.)

The City's Third Party Complaint, filed January 26, 2015, alleges that Third-Party Defendants Aecom Services, Inc., Tutor Perini, BCI Coca-Cola Bottling Company of Los Angeles, and Jaroth, Inc. (collectively,

"Third-Party Defendants") have indemnified the City of Los Angeles against claims such as those brought in the First Amended Complaint. (*See generally* Third-Party Complaint ("TPC"), ECF No. 45.) The Third Party Complaint alleges the following with respect to Tutor Perini.

Tutor Perini's predecessor in interest, Tutor-Saliba Corporation ("TSC"), was retained by the City in connection with the construction of the Flyaway facility. Among other things, TSC provided all materials, equipment and all required work to completely construct the Flyaway facility. (TPC ¶ 13.) TSC has now merged with Perini Corporation to form Tutor Perini Corporation. (TPC ¶ 14.) In its contract with the City to provide these services, TSC agreed to defend and indemnify the City against liabilities arising out of the contract. (TPC ¶ 15.) The Contract provides in relevant part:

> **Section 12.0 <u>City Held Harmless</u>.**
> Except for the City's sole negligence or willful misconduct, Contractor expressly agrees to, and shall, defend, indemnify, keep and hold City, including its Board and the Executive Director, its officers, agents, servants and employees, harmless from any and all costs, liability, damage or expense (including costs of suit and fees, and expenses of legal services) claimed by anyone (including Contractor) by reason of injury to, or death of, any person(s), or for damage to, or destruction of, any property (including property of Contractor): 1) sustained in, on or about the Project site(s); or 2) sustained as a proximate result of the acts or omissions of

> Contractor, its agents, servants, subcontractors, employees or invitees; or 3) relating to acts or events pertaining to, or arising from or out of, this Contract.
>
> **Section 20.0 Compliance With Applicable Laws.**
> 20.1. Contractor shall, at all times during the performance of its obligations under this Contract, comply with all applicable present and/or future local, Department of Airport's, State and Federal laws, statutes, ordinances, rules, regulations, restrictions and/or orders, including the hazardous waste and hazardous materials regulations, and the Americans With Disabilities Act of 1990. Contractor shall be solely responsible for any and all damages caused, and/or penalties levied, as the result of Contractor's noncompliance with such enactments. Further, Contractor agrees to cooperate fully with City in its efforts to comply with the Americans With Disability [sic] Act of 1990 and any amendments thereto, or successor statutes.

(TPC ¶ 15.) Based on these contractual provisions, the City brings claims for breach of contract, express contractual indemnity, and declaratory relief. (*See* TPC ¶¶ 24-39.)

In the instant Motion, Tutor Perini seeks to dismiss each of the causes of action included in the City's Third Party Complaint for failure to state a claim for which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12").

II. DISCUSSION

A. Legal Standard

Rule 12, which provides for dismissal of a plaintiff's cause of action for "failure to state a claim on which relief can be granted," *see* Fed. R. Civ. P. 12(b)(6), must be read in conjunction with Federal Rule of Civil Procedure 8(a) ("Rule 8"). *See Ileto v. Glock Inc.,* 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Rule 8 requires that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the pleader is not required to plead "detailed factual allegations" under Rule 8, this standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Pleadings that contain nothing more than legal conclusions or "a formulaic recitation of the elements of a cause of action" are insufficient. *Id.* (citation and quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Where a complaint pleads sufficient facts "to raise a right to relief above the speculative level," a court may not dismiss the complaint under Rule 12(b)(6). *See Twombly*, 550 U.S. at 555.

B. Preemption by Americans with Disabilities Act

Tutor Perini argues that Plaintiffs' indemnification and breach of contract claims are preempted by Federal

law. Tutor Perini relies primarily on *Independent Living Center of Southern California v. City of Los Angeles*, 973 F.Supp.2d 1139 (C.D. Cal. 2013). *Independent Living Center* involved ADA and Section 504 claims against the City of Los Angeles, and a cross-claim against a third party for state law indemnification of those claims. *Id*. at 1156. The court in *Independent Living Center* held that crossclaims for indemnification were preempted by Section 504 and Title II of the ADA. *Id*. at 1158. The Court agrees that the claims here are preempted as well.

Federal laws preempt conflicting state laws under the Supremacy Clause, which states that "Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2. "The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. FCC*, 486 U.S. 57, 63 (1988) (quoting U.S. Const., art. VI, cl. 2.). As such, "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *Id.* at 64. "[T]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (internal quotes and citation omitted). In conducting a preemption analysis, courts generally "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotes and citations omitted). "When the State regulates in an area where there has been a

history of significant federal presence, [however,] . . . presumption usually does not apply." *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (internal quotes and citations omitted).

As to the ADA, the presumption against preemption does not apply. *See Independent Living Ctr.*, 973 F.Supp.2d 1139. This is because Congress explicitly enacted the statute for the purpose of providing comprehensive, federal protections for people with disabilities, and because anti-discrimination statutes have not historically been a field of state law. *Id.*; *see Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir. 1996).

Federal law may preempt state law in three ways. *See, e.g.*, *Bank of Am. v. City of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). First, Congress may preempt state law through "language in the federal statute that reveals an explicit congressional intent to pre-empt state law." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996). Second, preemption may be inferred when "the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." *Id.* This occurs when federal regulation in a particular field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, preemption is implied when an "irreconcilable conflict" exists between the federal regulation and state law. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). Irreconcilable conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida*

Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Here, the second factor applies. "Congressional enactment of the ADA represents its judgment that there should be a comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001).

The City argues in its Opposition that its claims are contractual claims independent of the ADA and thus are not preempted. In *Equal Rights Center v. Archstone Smith Trust*, the District of Maryland addressed similar breach of contract claims. The court held: "As a matter of law, [Defendant's] state law claims for breach of contract . . . are wholly derivative of [Defendant's] primary liability and are therefore what federal law regards as de facto claims for indemnification. Accordingly, those state law claims are barred because any recovery by [Defendant] would frustrate the achievement of Congress' purposes in . . . the ADA." *Equal Rights Ctr. v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 824 (D. Md. 2009) *aff'd sub nom. Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597 (4th Cir. 2010).

The goals of the ADA are "regulatory rather than compensatory." *Niles Bolton Assocs.*, 602 F.3d at 602. "[T]he regulatory purposes of the . . . ADA would be undermined by allowing a claim for indemnity." *Id*. Here, the City sought to allocate the risk of loss to its contractors for the bus terminal at issue. The only

provisions of the City's contract cited by the Third Party Complaint are those for indemnification and legal compliance. "Allowing an owner to completely insulate itself from liability for an ADA . . . violation through contract diminishes its incentive to ensure compliance with discrimination laws." *Id*. For this reason, allowing the City to pursue breach of contract crossclaims to stand would be at odds with the intent of the ADA. Accordingly, the City's breach of contract, contractual indemnity, and declaratory relief claims against Tutor Perini is preempted by the ADA, and this claim is **DISMISSED**.

C. Leave to Amend

In its Opposition, the City argues that it should be granted leave to amend should the Court grant its Motion to Dismiss, noting that the City's contract with Tutor Saliba also contained independent specifications regarding standards for construction of the bus terminal. (Opp'n 18.) Tutor Perini responds that any other claims the City brought would be barred by the doctrine of preemption. (Reply 8.) Tutor Perini further argues that the Court should decline to exercise supplemental jurisdiction over any further state law claims that might be brought. (Reply 8.)

Federal Rule of Civil Procedure Rule 15 provides that "leave to amend shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Absent prejudice, or a 'strong showing' of the other factors, such as undue delay, bad faith, or dilatory motive, 'there exists a presumption under Rule 15(a) in favor of granting leave to amend.'" *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 957 (9th Cir. 2006) (citation omitted).

Here, however, it does not appear that the City could bring a viable amended claim. Any claim for indemnification of the ADA claims would be preempted, and any claim unrelated to the ADA claims would not warrant this Court's exercise of supplemental jurisdiction. The Court has supplemental jurisdiction over state law claims if they are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). The exercise of supplemental jurisdiction in such cases "should be rare . . . where a federal court without diversity jurisdiction is being asked to decide claims based wholly and exclusively on state law." *Acri v. Varian Assocs, Inc.*, 114 F.3d 999, 1001-02 (9th Cir. 1997). In this case, if the City were to bring an amended claim sufficiently unrelated to escape preemption, it would not be part of the same case or controversy, and the Court would accordingly decline supplemental jurisdiction. Thus, the Court does not grant the City leave to amend its counterclaim against Tutor Perini.

III. RULING

For the foregoing reasons, the Court **GRANTS** Tutor Perini's Motion to Dismiss. The City of Los Angeles' cross-claims against Tutor Perini are hereby **DISMISSED without leave to amend**.

IT IS SO ORDERED.

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56606

[Filed June 1, 2017]

CITY OF LOS ANGELES, a municipal corporation (acting by and through its Department of Airports), Third-party-plaintiff-Appellant,	)
v.	)
AECOM SERVICES, INC. and TUTOR PERINI CORPORATION, Third-party-defendants-Appellees,	)
And	)
BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES and JAROTH, INC., Third-party-defendants.	)

D.C. No. 2:13-cv-04057-SJO-PJW
U.S. District Court for Central California,
Los Angeles

ORDER

Before: MILAN D. SMITH, JR. and N.R. SMITH, Circuit Judges, and GARY FEINERMAN, District Judge.[1]

Judges M. Smith and N.R. Smith have voted to deny the petitions for rehearing en banc filed by Appellees Tutor Perini Corporation and AECOM Services, Inc., and Judge Feinerman so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petitions for rehearing en banc filed by Appellees are DENIED.

IT IS SO ORDERED.

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[1] The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV13-4057 SJO (PJWx)

[Filed January 26, 2015]

ALVIN MALAVE and JULIO OCHOA, individuals,
Plaintiffs,

v.

CITY OF LOS ANGELES and BAUER INTELLIGENT TRANSPORTATION, INC. a California Corporation,
Defendants.

CITY OF LOS ANGELES, a municipal corporation,
Third-Party Plaintiff,

v.

AECOM SERVICES, INC.; TUTOR PERINI CORPORATION; BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES; and JAROTH, INC.,
Third-Party Defendants.

Office of the Los Angeles City Attorney
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Attorneys for Third-Party Plaintiff
CITY OF LOS ANGELES

THIRD-PARTY COMPLAINT OF CITY OF LOS ANGELES; JURY TRIAL DEMANDED

Third-Party Plaintiff CITY OF LOS ANGELES (hereinafter, "City") alleges as follows:

JURISDICTION AND VENUE

1. The City's claims against AECOM SERVICES, INC., TUTOR PERINI CORPORATION, BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES and JAROTH, INC. (collectively, "Third-Party Defendants") form part of the same case and controversy as the claims asserted by Plaintiffs ALVIN MALAVE and

JULIO OCHOA (hereinafter, "Plaintiffs") against the City. Accordingly, this Court has jurisdiction over the City's claims against Third-Party Defendants pursuant to 28 U.S.C. Sections 1331 and 1367(a).

2. Venue is proper pursuant to 28 U.S.C. Section 1391(b).

PARTIES

3. Third-Party Plaintiff City is a municipal corporation and charter City duly organized under the laws of the State of California.

4. On information and belief, Third-Party Defendant AECOM SERVICES, INC. is and at all relevant times was a corporation licensed to conduct business in the State of California.

5. On information and belief, Third-Party Defendant TUTOR PERINI CORPORATION is and at all relevant times was a corporation licensed to conduct business in the State of California.

6. On information and belief, Third-Party Defendant BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES is and at all relevant times was a corporation licensed to conduct business in the State of California.

7. On information and belief, Third-Party Defendant JAROTH, INC. is and at all relevant times was a corporation licensed to conduct business in the State of California.

FACTUAL BACKGROUND

8. The current disputes relate to the design, construction and use of the Flyaway Bus Terminal which is owned and operated by the City at the Van Nuys Airport (hereinafter, "Flyaway facility"). Plaintiffs ALVIN MALAVE and JULIO OCHOA allege, among other things, that the Flyaway facility is not readily accessible and useable by persons with disabilities, in violation of Title II of the Americans with Disabilities Act and similar laws.

9. In summary, Plaintiffs allege that the design, construction and use of the Flyaway facility failed to comply with the Americans with Disabilities Act and similar laws.

10. Third-Party Defendant AECOM SERVICES, INC.'s predecessor in interest, Daniel, Mann, Johnson & Mendenhall ("DMJM") was retained by the City to provide design and construction administration support services in connection with the construction of the Flyaway facility. Among other things, DMJM provided complete architectural, graphic, structural, mechanical and electrical design services, as well as prepared 100% complete Final Drawings along with the accompanying specifications.

11. On information and belief, DMJM is now a subsidiary of AECOM SERVICES, INC.

12. In its contract with the City to provide these services, DMJM agreed to defend, indemnify, and hold harmless the City against all suits, claims, losses, demands, and expenses to the extent that any such claim results from the negligent and/or intentional wrongful acts or omissions of DMJM, its

subcontractors, officers, agents, servants, employees, successors or assigns. The contract expressly provides:

> **Section 13. <u>City Held Harmless</u>.**
>
> In addition to provisions of section 12 [Insurance] herein, Consultant undertakes and agrees to defend, indemnify and hold City, and any and all of City's Boards, officers, employees, assigns, and their successors in interest, harmless from and against all suits and causes of action, claims, losses, demands and expenses, including but not limited to, reasonable attorneys [sic] fees and costs of litigation, damage for death or injury to any person, including Consultant's employees and agents, or for damages to, or destruction of, any property of either party hereto, or of third persons, or for claims arising out of contract, strict liability or anti-trust, to the extent that any claim for personal injury and/or for property damage results from the negligent and/or the intentional wrongful acts or omissions of Consultant, its subcontractors of any tier, and its or their officers, agents, servants, or employees, successors or assigns.

13. Third-Party Defendant TUTOR PERINI CORPORATION's predecessor in interest, Tutor-Saliba Corporation ("TSC") was retained by the City in connection with the construction of the Flyaway facility. Among other things, TSC provided all materials, equipment and all required work to completely construct the Flyaway facility.

14. On information and belief, TSC has now merged with Perini Corporation to form TUTOR PERINI CORPORATION.

15. In its contract with the City to provide these services, TSC agreed to defend, indemnify, and hold harmless the City against all costs, liability, damage or expense (including costs of suit and fees, and expenses of legal services) sustained as a proximate result of the acts or omissions of TSC or relating to acts or events pertaining to, or arising out of, the contract. In relevant portion, the contract expressly provides:

> **Section 12.0 <u>City Held Harmless</u>.**
>
> Except for the City's sole negligence or willful misconduct, Contractor expressly agrees to, and shall, defend, indemnify, keep and hold City, including its Board and the Executive Director, its officers, agents, servants and employees, harmless from any and all costs, liability, damage or expense (including costs of suit and fees, and expenses of legal services) claimed by anyone (including Contractor) by reason of injury to, or death of, any person(s), or for damage to, or destruction of, any property (including property of Contractor): 1) sustained in, on or about the Project site(s); or 2) sustained as a proximate result of the acts or omissions of Contractor, its agents, servants, subcontractors, employees or invitees; or 3) relating to acts or events pertaining to, or arising from or out of, this Contract.

Section 20.0 <u>Compliance With Applicable Laws</u>.

20.1. Contractor shall, at all times during the performance of its obligations under this Contract, comply with all applicable present and/or future local, Department of Airport's, State and Federal laws, statutes, ordinances, rules, regulations, restrictions and/or orders, including the hazardous waste and hazardous materials regulations, and the Americans With Disabilities Act of 1990. Contractor shall be solely responsible for any and all damages caused, and/or penalties levied, as the result of Contractor's noncompliance with such enactments. Further, Contractor agrees to cooperate fully with City in its efforts to comply with the Americans With Disability [sic] Act of 1990 and any amendments thereto, or successor statutes.

16. Third-Party Defendant BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES ("BCI") was contracted by the City to provide vending machine services in connection with the construction of the Flyaway facility.

17. In its contract with the City to provide these services, BCI agreed to defend, indemnify, and hold harmless the City against all suits, claims, losses, demands, and expenses to the extent that any such claim results from the negligent and/or intentional wrongful acts or omissions of BCI, its subcontractors, officers, agents, servants, employees, successors or assigns. The contract expressly provides:

Section 21.0 <u>City Held Harmless</u>.

21.1 In addition to the provisions of Section 20.0 Insurance herein, Concessionaire shall defend, indemnify and hold harmless City and any and all of City's departments, boards, officers, agents, employees, assigns and successors in interest from and against any and all suits, claims, causes of action, liability, losses, damages, demands or expenses, (including, but not limited to, attorney's fees and cost of litigation), claimed by anyone (including Concessionaire and/or Concessionaire's agents or employees) by reason of injury to, or death of, any person(s), or for damage to, or destruction of, any property, including property of Concessionaire, and alleged to arise out of, pertain to, or relate to the Concessionaire's performance of the contract, whether or not contributed to by any act or omission of City, or of any of City's departments, boards, officers, agents or employees.

21.2 In addition, Concessionaire agrees to protect, defend, indemnify, keep and hold harmless City and any and all of City's departments, boards, officers, agents, employees, assigns and successors in interest from and against any and all claims, damages, liabilities, losses and expense arising out of any threatened, alleged or actual claim that the end product provided to LAWA by Consultant violates any patent, copyright, trade secret, proprietary right, intellectual property right, moral right, privacy, or similar right, or any

> other rights of any third party anywhere in the world. Concessionaire agrees to, and shall, pay all damages, settlements, expenses and costs, including cost of investigation, court costs and attorney's fees, and all other costs and damages sustained or incurred by City and any and all of City's departments, Boards, officers, agents, employees, assigns and successors in interest arising out of, or relating to, the matters set forth above in this paragraph of the City's Hold Harmless agreement.

18. Third-Party Defendant JAROTH, INC. ("Jaroth") was contracted by the City to install, operate and maintain the public payphone equipment in connection with the construction of the Flyaway facility.

19. In its contract with the City to provide these services, Jaroth agreed to defend, indemnify, and hold harmless the City against all suits, claims, losses, demands, and expenses to the extent that any such claim results from the negligent and/or intentional wrongful acts or omissions of Jaroth, its subcontractors, officers, agents, servants, employees, successors or assigns. The contract expressly provides:

> **Section 11.0 <u>Hold Harmless and Indemnification</u>.**
>
> 11.1 City Held Harmless. In addition to the Insurance provisions herein, Operator shall indemnify, defend, keep, and hold City, including Board, and City's officers, agents, servants, and employees, harmless from any and all costs, liability, damage, or expense (including

> costs of suit and fees and reasonable expenses of legal services) claimed by anyone by reason of injury to or death of persons, including Operator, damage to or destruction of property, including property of Operator, sustained in, on, or about the Airport or arising out of Operator's use or occupancy of Airport or arising out of the acts or omissions of Operator, its agents, servants, or employees acting within the scope of their agency or employment, provided except for the sole negligence of LAWA.

20. The City has performed all of its obligations under its contracts with the Third-Party Defendants, except for those obligations which have been excused.

21. Following receipt of Plaintiffs' Complaint in the above-referenced matter, the City tendered its defense and indemnity to each of the Third-Party Defendants. Despite their contractual obligations to the City, each of the Third-Party Defendants refused to accept the City's tender.

22. As a result of the failures of Third-Party Defendants to perform their contractual obligations to the City, and the failures of the predecessors of Third-Party Defendants to perform their contractual obligations in an appropriate manner, the City has been required to and is proceeding to defend itself from the claims of Plaintiffs, thereby incurring attorneys' fees and costs as well as potential liabilities to be proven at trial.

23. Moreover, Plaintiffs seek injunctive relief as against the City which includes but is not limited to

modifying the Flyaway facility to fully comply with the Americans with Disabilities Act.

FIRST CAUSE OF ACTION

Breach of Contract

24. The City incorporates by reference paragraphs 1 thru 23, inclusive.

25. The City's contracts with each of the Third-Party Defendants required each of them to provide services in connection with the Flyaway Bus Terminal facility, as alleged aforesaid. On information and belief, each of the Third-Party Defendants failed to provide said services in an appropriate manner, including with regard to ensuring compliance with Title II of the Americans with Disabilities Act and other similar laws.

26. The City has fulfilled all of its obligations under its contracts, except for those obligations which have been excused.

27. Each of the Third-Party Defendants (either by virtue of entering into their respective contracts with the City and/or being the successor in interest) is legally responsible for the breach of their respective contract with the City.

28. As a direct and proximate result of the aforementioned breach, the City has incurred and will continue to incur attorneys' fees and costs in the defense of Plaintiffs' claims, as well as potential liabilities. The sum incurred for all of the foregoing will be proven at trial.

29. Should Plaintiffs prevail and obtain the requested injunctive relief as against the City, the City

will be legally required to undertake extensive modifications to the Flyaway facility, from which Third-Party Defendants must indemnify the City.

30. Wherefore, the City prays for judgment against Third-Party Defendants, and each of them, as hereinafter set forth.

SECOND CAUSE OF ACTION

Express Contractual Indemnity

31. The City incorporates by reference paragraphs 1 thru 30, inclusive.

32. As alleged aforesaid, Third-Party Defendants are obligated to defend, indemnify and hold harmless the City from and against any and all claims, losses, damages, attorneys' fees, judgments, injunctions and settlement expenses incurred or to be incurred as a result of their negligent or wrongful acts in connection with the performance of their contracts with the City. This includes indemnifying and holding the City harmless from the claims of Plaintiffs, which claims are expressly denied.

33. The City has tendered its defense of Plaintiffs' claims to Third-Party Defendants. Third-Party Defendants have declined those tenders and refused to defend, indemnify and hold the City harmless from Plaintiffs' claims.

34. As a direct and proximate result of the wrongful refusal of Third-Party Defendants to defend, indemnify and hold the City harmless, the City has incurred and will continue to incur attorneys' fees and costs in the defense of Plaintiffs' claims, as well as potential

liabilities. The sum incurred for all of the foregoing will be proven at trial.

35. Wherefore, the City prays for judgment against Third-Party Defendants, and each of them, as hereinafter set forth.

THIRD CAUSE OF ACTION

Declaratory Relief

36. The City incorporates by reference paragraphs 1 thru 35, inclusive.

37. An actual controversy exists between the City and Third-Party Defendants, and each of them, under the circumstances alleged.

38. By reason of the matters alleged herein, the City seeks a judicial determination of its rights and duties and a declaration as to whether Third-Party Defendants are obligated to defend, indemnify and hold the City harmless from Plaintiffs' claims and, in the event Plaintiffs obtain a judgment against the City, the City is entitled to be indemnified by the Third-Party Defendants, and each of them. Such a declaration is necessary and appropriate in order that the City may ascertain its rights and duties and to avoid a multiplicity of actions and to settle all claims between the parties.

39. Wherefore, the City prays for judgment against Third-Party Defendants, and each of them, as hereinafter set forth.

PRAYER

WHEREFORE, the City prays for judgment against Third-Party Defendants, and each of them, as follows:

1. For damages according to proof;

2. For indemnity from and against any judgment that Plaintiffs may obtain against the City;

3. For a declaratory judgment adjudicating that Third-Party Defendants, and each of them, are obligated to defend and hold the City harmless from any judgment or settlement, to reimburse it for all costs, expenses, legal fees and other damages incurred by it in defending this action;

4. For attorneys' fees under California Code of Civil Procedure Section 1021.6 and as authorized by contract;

5. For costs of suit herein; and

6. For such other and further relief as the Court may deem just and proper.

Dated: January 26, 2015

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: /s/ Kevin E. Gilbert
Kevin E. Gilbert
Kevin P. McLaughlin
Attorneys for Third-Party Plaintiff
CITY OF LOS ANGELES

JURY TRIAL DEMANDED

The City hereby demands trial by jury on those claims that may be tried to a jury.

Dated: January 26, 2015

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: /s/ Kevin E. Gilbert
Kevin E. Gilbert
Kevin P. McLaughlin
Attorneys for Third-Party Plaintiff
CITY OF LOS ANGELES