No. 17-150

In The Supreme Court of the United States

TUTOR PERINI CORPORATION,

Petitioner,

vs.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT CITY OF LOS ANGELES

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QUESTION PRESENTED

Did the Ninth Circuit err in holding, consistent with this Court's settled precedent establishing both a presumption against preemption and a narrow standard for conflict preemption, that Title II of the ADA and Section 504 of the Rehabilitation Act do not impliedly preempt state law contract claims for contribution by a public entity against contractors it employed to construct ADA-compliant facilities, where the public entity remains fully accountable to the plaintiff for damages and injunctive relief in the first instance, as well as for its own negligence or misconduct, and the contractors are merely liable for their own failure to fulfill their contractual obligation to build ADA-compliant facilities?

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STATEMENT OF THE CASE

The Ninth Circuit opinion accurately describes the relevant facts, so we will not burden this Court with a full Statement of the Case. We solely address the nature of the third-party claims that respondent City of Los Angeles ("the City") filed against petitioner Tutor Perini Corporation ("Tutor Perini") and respondent AECOM Services, Inc. ("AECOM"), and the Ninth Circuit's related findings. Understanding the limited scope of the City's claims is crucial to understanding the opinion. It also is key to understanding why the opinion does not create any circuit split or meaningfully conflict with any decision at any level.

Tutor Perini's petition and AECOM's supporting brief omit much of this background. Both sweepingly characterize the opinion as conflicting with cases where courts found that the ADA preempted broad "indemnification" claims that sought to shift *all* liability to a third party. As the opinion recognizes, the City's claims here fundamentally differ – they are contract claims for *de facto* contribution that merely seek to hold the third-party defendants liable for *their own* wrongdoing.

A. The City, After Being Sued For ADA And Section 504 Violations, Files A Third-Party Complaint For Breach of Contract And Express Indemnity Against The Designer And Builder Of The Non-Compliant Facility.

Two physically-disabled individuals sued the City for violations of Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12131 et seq.) ("ADA") and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 794 et seq.) ("RHA § 504"). (Pet. App. 4.) They claimed one of the City's bus facilities was not constructed in a manner that made it readily accessible and usable by persons with disabilities. (*Id.*) They did not sue the designer or builder of the bus facility.

The City, because it is not in the construction business, had retained expert companies to design and build the bus facility in compliance with the ADA and RHA § 504. (Pet. App. 5-6, 17.) Petitioner Tutor Perini is the successor in interest to the expert company retained to provide design and construction administration support. (*Id*. at 6.) Respondent AECOM is the successor in interest to the expert company retained to construct the facility. (*Id*. at 5.) Based on the specific provisions of the contracts those predecessors signed, the City filed a third-party complaint against Tutor Perini and AECOM for breach of contract and for express indemnity. (*Id*. at 5-6.)

In terms of "indemnification" or "indemnity," this case solely concerns the limited indemnity provisions in those contracts. The terms "indemnification"

or "indemnity" mean little standing alone as they generically reference one party's obligation to pay loss incurred by another. *See Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 532 P.2d 97, 100-01 (Cal. 1975); http://thelawdictionary.org/indemnify. Where, as here, parties "'have expressly contracted with respect to the duty to indemnify, the extent of the duty must be determined *from the contract*,'" not generic references to "indemnification" contained in cases. *Wells Fargo Bank, N.A. v. Renz*, 795 F. Supp. 2d 898, 913 n.6 (N.D. Cal. 2011) (quoting *Rossmoor Sanitation*, 532 P.2d at 100) (emphasis added); *Commercial Ins. Co. of Newark, N.J. v. Pacific-Peru Constr. Corp.*, 558 F.2d 948, 953 (9th Cir. 1977) (where contractual indemnification provision exists, implied indemnity principles are irrelevant).

B. In Compliance With Codified California Public Policy, The Subject Contracts – Including The Indemnity Provision – Impose Liability Solely For The Builder's And Designer's Own Misconduct.

California has specifically mandated as a matter of state public policy what types of indemnity provisions are acceptable for public-agency construction contracts. *See* Cal. Civ. Code § 2782 et seq.

With respect to public-agency contracts "for design professional services," the California Legislature has declared that contract provisions purporting to indemnify the public agency "against liability for claims

against the public agency, are unenforceable, *except for* claims that arise out of, pertain to, or relate *to the negligence, recklessness, or willful misconduct of the design professional*." Cal. Civ. Code § 2782.8(a) (emphasis added). The statute includes all design professionals, including architects, engineers and surveyors. Cal. Civ. Code § 2782.8(c)(2).

With respect to a public agency's construction contracts with general contractors, the California Legislature has decreed "void and unenforceable" any contract clause that purports to "impose on the contractor, or relieve the public agency from, liability for the *active negligence of the public agency.*" Cal. Civ. Code § 2782(b)(1) (emphasis added); *see also id*., (b)(2). The California Legislature also has prohibited, in all construction contracts, provisions purporting to indemnify the promisee against damages arising from the promisee's "sole negligence or willful misconduct." Cal. Civ. Code § 2782(a).

Thus, the California Legislature has already statutorily prohibited the type of broad indemnification provisions at issue in the ADA-related "indemnification" cases that Tutor Perini and AECOM have relied on in this case. But, the California Legislature lets public agencies contractually require builders and designers to indemnify losses caused by builders' and designers' *own misconduct*. That balance of barring municipalities from seeking indemnity for their own active misconduct while holding designers and builders liable for their own misconduct reflects sound public policy that wrongdoers in construction projects can

and should be held accountable through indemnity provisions. *See*, *e.g.*, 2011 Cal. Legis. Serv. Ch. 707 (S.B. 474) § 1 ("The Legislature finds and declares that it is in the best interests of this state and its citizens and consumers to ensure that *every construction business* in the state is responsible *for losses that it*, as a business, *may cause*.") (emphasis added).

The indemnity provisions in the City's contracts with the builder and designer of the subject public facility track these statutes.

The indemnity provision in the City's contract with the expert designer (AECOM's predecessor) does not make that consultant liable for the City's wrongdoing or for all claims arising out of the construction project or the consultant's work. Instead, the provision is expressly limited to personal injury and/or property damage resulting "from the *negligent and/or the intentional wrongful* acts or omissions *of Consultant*" or its employees, subcontractors or agents. (Pet. App. 5, emphasis added.)

The City's contract with the facility builder (Tutor Perini's predecessor) is similarly limited. The indemnity provision only applies to damages or loss sustained because of the company's acts or omissions or relating to the contract and it expressly *excepts* "the City's sole negligence or willful misconduct." (Pet. App. 6.) A separate "compliance with laws" provision requires the contractor to comply with all federal laws, specifically including the ADA, but states that the contractor is only liable for damages resulting from the

"*Contractor's* noncompliance" with those laws. (*Id*., emphasis added.)

C. In Compliance With That Codified Public Policy And The Contracts' Limited Indemnity Provisions, The City's Third-Party Complaint Merely Seeks To Hold The Designer And Builder Liable For Their Own Misconduct.

The City's third-party complaint against Tutor Perini and AECOM tracks the limited scope of the contractual indemnity provisions and California's codified policy regarding public-entity construction contracts. It only seeks to hold them liable for their predecessors' actual misconduct.

The City's count for breach of contract alleges that the expert designer and builder had failed to provide contractually-promised services, including "ensuring compliance with Title II of the [ADA] and other similar laws." (Pet. App. 56.)

The City's count for "express contractual indemnity" only seeks to have the City indemnified from any damages or losses "incurred or to be incurred as a result of [the third-party defendants'] *negligent or wrongful acts* in connection with the performance of their contracts with the City." (Pet. App. 57, emphasis

added.) It does not request indemnification of the City's own wrongdoing. (*Id.*)[1]

The district court struck the entire complaint on preemption grounds. Consequently, the preemption question before the Ninth Circuit was whether Congress, in enacting the ADA and RHA § 504, intended to preempt limited contract claims that merely seek to hold the designer and builder of a public facility liable for *their own* misconduct, thereby nullifying *codified* California public policy.

D. The Opinion Correctly Recognizes That The City's Contract Claims Are For *De Facto* Contribution.

Ignoring the limited nature of the City's third-party complaint, Tutor Perini and AECOM filled their district court and Ninth Circuit briefs with sweeping references to the City seeking "indemnification" and relied on ADA preemption cases where a party sought to insulate itself from all liability, including liability for its own wrongdoing. The Ninth Circuit saw through the attempt.

The opinion correctly recognizes that the City's claims for breach of contract and for express indemnity are contract claims "for *de facto* contribution." (Pet. App. 24.) As the opinion explains, unlike the claims at issue in the indemnification cases cited by Tutor Perini

[1] The City also filed a declaratory relief claim, requesting an adjudication of its rights against the third-party defendants. (Pet. App. 58.)

and AECOM, "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." (Pet. App. 23-24, original emphasis; *see also id.* at 13 (opinion explaining that "the relevant contractual provisions assign liability to Appellees only to the extent that their own actions give rise to liability"); *id.* at 17 (opinion explaining that "the City does not seek indemnification or contribution for damages arising out of its own failure to implement policies or exercise oversight").)

After extensively analyzing this Court's preemption standards, including the governing presumption against preemption, the Ninth Circuit held that "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." (Pet. App. 24.)

SUMMARY OF ARGUMENT

Tutor Perini's petition and AECOM's supporting brief make it sound like the Ninth Circuit has gone rogue. They suggest the opinion creates a circuit split, conflicts with every case across the country that has ever addressed the same preemption issue, violates this Court's precedent, and harms disabled persons. But, as the Ninth Circuit's opinion makes clear, the exact opposite is true: There is no such conflict. The

opinion follows this Court's settled preemption precedent. And the opinion furthers – not hinders – the purpose of the ADA and the RHA. The petition should be denied, for multiple reasons:

1. Tutor Perini and AECOM fail to explain what the opinion actually holds or means. Both make sweeping assertions about the City seeking "indemnification," or trying to shift non-delegable duties, or trying to shirk its own responsibilities. But, as the opinion recognizes, the City's contract claims are for *de facto* contribution, not full indemnity. They only seek to hold the designer and builder of the subject public facility liable for *their own* misconduct and contractual breaches. The opinion does not insulate cities from ADA liability – cities remain fully accountable for all damages and injunctive relief, as well as for their own misconduct. Here, the City has already settled with the plaintiffs and agreed to bring the public facility into compliance. The question is simply whether the facility's builder and designer can immunize themselves from their contractual breaches by claiming preemption. The opinion correctly answers: "No."

2. The opinion does not conflict with any circuit decision, or meaningfully conflict with *any* state or lower federal court decision. Only one circuit case has previously addressed ADA preemption, the Fourth Circuit's decision in *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597 (4th Cir. 2010). The Ninth Circuit's opinion expressly distinguishes that decision on the ground that it involved a wrongdoer's attempt to

insulate itself from all liability through a broad indemnification claim. The opinion also correctly notes that Fourth Circuit law, including the very decision *Equal Rights Center* followed, *supports* the opinion's holding that the City's *de facto* contribution claims are *not* preempted. The state and lower federal court cases that Tutor Perini and AECOM tout as conflicting with the opinion are distinguishable for the same reason. They address full indemnity – a party's attempt to shift all liability to another, including for its own misconduct. That is not what this case is about.

3. The opinion is entirely consistent with this Court's preemption precedent. It follows the longstanding presumption against preemption, which requires a clear and manifest showing of congressional intent to preempt – a showing utterly absent here. The opinion likewise comports with this Court's narrow, stringent standard for implied conflict preemption. The opinion correctly recognizes that the City's state-law contract claims do not irreconcilably conflict with the goal of ADA Title II or RHA § 504. Instead, the City's contribution claims actually *further* those goals. They ensure that designers and builders of non-compliant public facilities cannot escape scot-free for their contractual breaches and have full incentive to build facilities correctly in the first place.

4. The opinion does not conflict with this Court's decision in *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77 (1981). In suggesting otherwise, Tutor Perini improperly conflates implied-remedy and preemption law. *Northwest* is an

implied-remedy case; it recognizes a presumption against *implying a federal remedy* into federal statutes. That is not the issue here. This is a preemption case. The issue is whether Congress intended to preempt a municipality's state-law contract claims for contribution against parties who breached contractual duties to build ADA-compliant facilities. There is not a speck of evidence that Congress intended to do so.

The Ninth Circuit's well-reasoned decision does not meet certiorari standards or warrant this Court's intervention. The petition should be denied.

REASONS WHY CERTIORARI IS NOT WARRANTED

I. REVIEW IS UNWARRANTED BECAUSE THERE IS NO CIRCUIT CONFLICT, NOR EVEN ANY MEANINGFUL CONFLICT WITH FEDERAL OR STATE DECISIONS AT ANY LEVEL.

A. There Is No Circuit Conflict: The Opinion Distinguishes The Only Other Circuit Decision That Addresses ADA Preemption, And That Circuit's Law Supports The Opinion's Holding.

Tutor Perini and AECOM both urge that review is necessary to resolve "a square circuit conflict" created by the Ninth Circuit's opinion. (AECOM Br. 2, capitalization normalized; *see* Pet. i (question presented #1), 8

("the split in the circuits creates confusion").) There is no conflict.

Tutor Perini and AECOM admit that only one other circuit case has addressed ADA preemption, the Fourth Circuit's decision in *Equal Rights Center*, 602 F.3d 597. (Pet. 7, 13-14; AECOM Br. 3-4.) But the opinion does not conflict with that case. Instead, the opinion expressly *distinguishes* it, and does so in a manner that is entirely consistent with Fourth Circuit precedent. (Pet. App. 13-14.)

Equal Rights Center did not involve a public entity or a claim under ADA Title II or RHA § 504. The plaintiffs, rather, sued a private developer/owner of a private housing project, the architect and various contractors, for failing to provide apartments that would be accessible to people with disabilities. 602 F.3d at 598-99. The Fourth Circuit found conflict preemption as to the developer's indemnification claim against the architect, emphasizing that the claim "sought to allocate the full risk of loss" for the apartment building – "100% of the losses" – to the architect and that such indemnification would mean that the developer will not be accountable for its own discriminatory practices. *Id.* at 603.

The Ninth Circuit's opinion recognizes that "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.'" (Pet. App. 13, original emphasis.) The opinion notes that, "[h]ere, 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." (*Id*.) The opinion continues: "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 requirements if Title II and § 504 are found to preempt Appellant's claims." (*Id*. at 13-14.)

Not only does the opinion distinguish *Equal Rights Center*, the opinion also correctly recognizes that other Fourth Circuit precedent – including precedent on which *Equal Rights Center* relied – supports the opinion's holding that the City's claims are not preempted.

Equal Rights Center only found that the ADA preempted the developer's indemnification claim seeking to shift all liability; the court never determined whether the ADA preempted contribution claims. *See Equal Rights Center*, 602 F.3d at 601-02. The Ninth Circuit opinion acknowledges the case's limited reach, noting *Equal Rights Center* expressly declined to reach

whether "preemption would apply to claims for contribution, as opposed to those for indemnification." (Pet. App. 18; *see also id.* at 14 (noting *Equal Rights Center* never decided "whether a genuine state-law claim for contribution would be preempted").)

But *Equal Rights Center* based its preemption analysis on another Fourth Circuit decision, *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989), and that case *supports* the view that the City's claims are *not* preempted.

Baker, Watts found that the Securities Exchange Act of 1993 preempted state-law claims for indemnity but did *not* preempt state-law contribution claims. 876 F.2d at 1108. Its reasoning: Indemnification runs counter to federal securities law because it allows a wrongdoer "to shift its entire responsibility for federal violations," but contribution is not antithetical because it means everyone who violated the statute remains accountable and because preemption of contribution could immunize wrongdoers. *Id.*

That conclusion is entirely consistent with the Ninth Circuit's opinion. Indeed, the opinion specifically relies on *Baker, Watts* as supporting authority. (*See* Pet. App. 14 n.3 ("Notably, in *Baker, Watts* . . . , a case upon which the *Equal Rights Center* court relied heavily for its preemption analysis, the Fourth Circuit held that the federal securities law preempted claims for indemnification, but that it did *not* similarly preempt claims for contribution.") (original emphasis); *id*. at 24 (citing/quoting *Baker, Watts* as

"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 by Ninth Circuit); *see also United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 779 (E.D.N.C. 2003) (relying on *Baker, Watts* in holding that a construction company's *de facto* contribution claims against an architect for Fair Housing Act claims were *not* preempted).

Fourth Circuit law also directly undermines Tutor Perini's and AECOM's assertions that the contribution claims permitted by the opinion would enable a municipality "to shift its *non-delegable duty* to comply with those federal civil rights statutes to other entities." (AECOM Br. 2, original emphasis; Pet. 6 (arguing the issue is whether an owner can "shift financial responsibility for its non-delegable duty").) As Fourth Circuit law recognizes, even where a duty is "non-delegable," the party with that duty who ends up paying a judgment or settlement can still pursue reimbursement or contribution from any other wrongdoers who caused the harm – exactly as the Ninth Circuit's opinion allows. *See Walker v. Crigler*, 976 F.2d 900, 905 n.9 (4th Cir. 1992) ("It must not be overlooked that although the property owner's duty to prevent discrimination is non-delegable, the owner will not be subject to liability for the full amount of all successful claims to the extent that contribution from other liable parties may offset some, or all, of the payment for which

the owner is responsible."). Abundant authority likewise confirms that contribution claims do not conflict with "non-delegable" duties.[2]

The non-delegable nature of the City's ADA responsibility merely means that the City, as it has consistently acknowledged throughout the underlying lawsuit and as remains true under the Ninth Circuit's opinion, always remains liable to any ADA plaintiffs as a matter of law for the full amount of all damages and injunctive relief. But as Fourth Circuit law demonstrates, that does not mean that ADA violators – such as designers and builders who breached contractual duties to construct compliant public facilities – are immune from state-law contractual contribution claims. Not only does the opinion not conflict with *Equal Rights Center*, it is directly supported by Fourth Circuit law.

There is no circuit split.

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[2] *See*, *e.g.*, *Parsons v. Sorg Paper Co.*, 942 F.2d 1048, 1050 (6th Cir. 1991) (although employer railroad "may not evade its nondelegable duty" to pay damages for failing to provide a safe place to work, it could "seek contributions from third party industries" through contractual indemnification provisions); *Robinson v. Shapiro*, 646 F.2d 734, 739 (2d Cir. 1981) ("even where the party seeking indemnity or contribution is held liable for breach of a nondelegable duty," New York law allows that party to seek contribution from a party who was at least partially responsible); 18 C.J.S. *Contribution* § 20, Contractors, property owners and tenants (2017) ("provisions of a statute placing a non-delegable duty to provide a safe place to work" do not deprive an owner from recovering on a third-party claim for contribution against any contractors or subcontractors who were at fault).

B. The Opinion Does Not Conflict With Any State Cases.

Tutor Perini and AECOM similarly resort to hyperbole in claiming the opinion conflicts with state court decisions, specifically, *Rolf Jensen & Associates v. Dist. Ct.*, 282 P.3d 743 (Nev. 2012) and *Chicago Housing Authority v. DeStefano and Partners, Ltd.*, 45 N.E.3d 767 (Ill. App. Ct. 2015). (*See* Pet. 16; AECOM Br. 3, 4.) The Ninth Circuit's opinion does not mention either decision, let alone purport to conflict with them. There is no conflict.

Rolf Jensen, 282 P.3d 743, is not an ADA Title II case; it is essentially an *Equal Rights Center* clone. A casino developer-owner sued an ADA consultant for indemnification based upon a contract provision that broadly required the consultant to indemnify the developer for any damages arising out of the consultant's acts or omissions (a provision broader than the City's here and one that would be unenforceable under California law). *Id.* at 745. Relying on *Equal Rights Center*, the Court concluded that the developer should not be allowed "to *completely insulate itself from liability* for an ADA or FHA violation through contract" and put itself in a position where it could "ignore . . . nondelegable responsibilities under the ADA." *Id.* at 748 (emphasis added). In stark contrast to the situation here, where the City had no choice but to rely on contractors and consultants to build an ADA-compliant facility, *Rolf Jensen* concluded that "[i]n *today's commercial construction industry*, it is surely an owner such as Mandalay – a *highly sophisticated entity with ultimate*

authority over all construction decisions – who is in the best position to prevent violations of the ADA." *Id.* at 749 (emphasis added).

The opposite is true here. The City merely seeks contractual contribution, not to insulate itself from its own wrongdoing, and unlike the sophisticated developer in *Rolf Jensen*, the City had no choice but to hire experts to ensure ADA compliance. Thus, as the opinion holds, the "greater concern [here] is the potential for contractors to shield themselves from any liability they caused . . . ." (Pet. App. 13.)

Although *Chicago Housing*, 45 N.E.3d 767, is an ADA Title II preemption case, it did not involve contract claims analogous to the City's; rather, it involved a sweeping indemnity claim that would violate California law. *See* 45 N.E.3d at 773-76 (relying on *Equal Rights Center*, court concluded indemnification would insulate defendant from liability). Again, the City's contract claims here do not – and cannot under California law – seek to shift the City's negligence to anyone.

C. The District Court Cases Provide No Basis For Review.

Tutor Perini and AECOM argue that the Ninth Circuit's opinion conflicts with *Independent Living Center of S. Cal. v. City of L.A.*, 973 F. Supp. 2d 1139 (C.D. Cal. 2013). (Pet. 7; AECOM Br. 3-4.) Of course,

any conflict between a California district court decision and a Ninth Circuit case is irrelevant – the Ninth Circuit's opinion controls.

But Tutor Perini and AECOM also ignore the opinion's well-reasoned analysis of *Independent Living Center*. (*See* Pet. App. 15-17.) The opinion faults *Independent Living Center* only to the extent it "did not discuss any difference between claims seeking contractual contribution, and those seeking indemnity." (*Id*. at 16.) The opinion otherwise recognizes that the case is *factually distinguishable* because "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" – "factual circumstances [that] stand[ ] in stark contrast to the situation presented by this appeal." (*Id.* at 16-17.)

Tutor Perini and AECOM further miss the mark by citing various non-California district court cases as somehow "conflicting" with the opinion. Even assuming district court cases could ever create a meaningful conflict with a circuit decision for purposes of certiorari review, once again the "conflict" is fictional.

The cited cases, to the extent they involve preemption at all (many don't), involve the sort of sweeping all-liability indemnification claims that *Equal Rights Center* addresses, not the contractual contribution claims at issue here.[3] AECOM half-heartedly tries to

[3] Rather than addressing preemption, many of the cited cases address the entirely distinct issue of whether a *federal remedy* for indemnification or contribution *can be implied into* the

suggest otherwise by asserting in a footnote that the Ninth Circuit's distinguishing of *Equal Rights Center* does not matter for review purposes because *other* courts "have held that the ADA preempts *both* indemnification *and* contribution claims." (AECOM Br. 3 n.3, original emphasis.) But AECOM cites only one such case, *United States v. Murphy Dev., LLC*, No. 3:08-0960, 2009 WL 3614829, at *2 (M.D. Tenn. Oct. 27, 2009) – which appears to be the only such case across the country. *Murphy*, which is not an ADA Title II case, dismissed state law claims for express or implied indemnity *and* contribution (it never addressed breach-of-contract claims) based solely upon the district court decision underlying *Equal Rights Center*. *See id.* at *2. In doing so, *Murphy* failed to recognize that the district court holding, and the subsequent circuit court decision in *Equal Rights Center*, only applied to state law *de facto* claims for indemnification (a full shifting of liability), not *de facto* contribution claims. *See Equal Rights Center v. Archstone Smith Trust*, 603 F. Supp. 2d 814, 825-26 (D. Md. 2009); *Equal Rights Center*, 602 F.3d at 601-02.

Even other district court cases cited by Tutor Perini and AECOM recognize the distinction. *See United States v. Quality Built Constr., Inc.*, 309 F Supp. 2d at 779 (holding construction companies *de facto*

ADA or the Federal Housing Act. (*See*, *e.g.*, *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); *Access 4 All, Inc. v. Trump Int'l Hotel and Tower Condominium*, No. 04-CV-7497KMK, 2007 WL 633951, at *6-7 (S.D.N.Y. Feb. 26, 2007), cited at Pet. 15.)

claims for indemnification against architect for Fair Housing Act claims were preempted but *de facto* claims for contribution *were not*; the architect "had an independent obligation to perform competently and fulfill the terms of its contract" and therefore the construction company can pursue "these distinct state law claims which may allow for some form of contribution"); *United States v. Bryan Co.*, No. 3:11-CV-302-CWR-LRA, 2012 WL 2051861, at *2 (S.D. Miss. June 6, 2012) (following *Equal Rights Center* as preempting indemnification claim to shift all liability but emphasizing that this was *not* a contribution claim).

Thus, even assuming the Ninth Circuit's opinion somehow "conflicts" with *any* district court decision, there certainly is no meaningful conflict warranting review by this Court.

II. REVIEW IS UNWARRANTED BECAUSE THERE IS NO CONFLICT WITH THIS COURT'S PRECEDENT.

Tutor Perini argues that the Opinion "disregards prior precedent from this Supreme Court," in particular, *Northwest*, 451 U.S. 77. (Pet. 6-7; *see id.* at 22 (arguing the Ninth Circuit "erroneously ignored this Court's holding in *Northwest*").) Not so. The opinion correctly follows and applies this Court's settled preemption precedent.

A. The Ninth Circuit Correctly Followed This Court's Settled Preemption Precedent.

1. The Opinion applies the presumption against preemption.

Far from breaking new ground, the opinion follows this Court's settled precedent establishing a presumption against preemption. It correctly emphasizes that "'[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.'" (Pet. App. 9 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) and also citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).)

The opinion correctly recognizes that "the presumption is rooted in federalism concerns." (Pet. App. 20 (citing *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977) and *Wyeth*, 555 U.S. at 565 n.3 and *id.* at 583-87 (Thomas, J., concurring in the judgment)).) Again citing this Court's precedent, the opinion correctly notes that "[s]tates have historically regulated in the area of civil rights generally, and in the field of discrimination against disabled individuals specifically[,]" and so the court therefore "appl[ies] the presumption against preemption." (*Id.* at 20, citations omitted.) The opinion then correctly recognizes that nothing – not the statutory language, legislative history or anything else – indicates that it was Congress's "clear and manifest

purpose" to preempt state-law contract claims for *de facto* contribution. (*Id.* at 21.)

Tutor Perini and AECOM do not claim that anything shows such a clear and manifest purpose. Instead, as the petition makes clear, their preemption claim rests on congressional *silence* – the notion that Congress did not expressly state that it was allowing such claims, so it should be inferred that it intended to bar them. But this Court's "'pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as preempting state law.'" *Wyeth*, 555 U.S. at 603 (Thomas, J., concurring in the judgment) (citation omitted). This Court has instructed that "matters left unaddressed in [a comprehensive and detailed statutory scheme] are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, 512 U.S 79, 85 (1994).

2. The Opinion comports with the Court's narrow standard for conflict preemption, which requires an irreconcilable conflict.

This Court has recognized three separate preemption standards – express, field and conflict. *Hillsborough Cnty. v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985). Tutor Perini's and AECOM's preemption argument rests on conflict preemption.[4] Again, the

[4] Express preemption is irrelevant because the ADA and RHA do not expressly preempt any state law claims. Field

opinion tracks – not conflicts with – this Court's "conflict preemption" precedent.

Conflict preemption exists only where it is physically impossible to comply with both the state and federal law, or the state law creates "an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . .'" *Wyeth*, 555 U.S. at 563-64. As this Court has repeatedly explained, this is a highly stringent standard.

"Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (citations omitted). "[Supreme Court] precedents 'establish that a *high threshold* must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.'" *Id*. (citation omitted) (emphasis added).

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preemption is irrelevant because the ADA *expressly* recognizes that it does *not* occupy the entire field of disability discrimination: It contains a "construction" provision regarding the Act's relationship to other laws, which specifies that "Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or *law of any State or political subdivision of any State* or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. § 12201(b) (emphasis added).

"Any conflict must be '*irreconcilable* . . . . The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of [state law].'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (emphasis added) (Kennedy, J., concurring in part and concurring in judgment) (citations omitted); *accord*, *English v. General Elec. Co.*, 496 U.S 72, 90 (1990) (conflict must be actual, not hypothetical or speculative). Courts must apply conflict preemption cautiously because they violate the constitution if they impose their own policy conceptions. *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring in the judgment) ("implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution"); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 911 (2000) (Stevens, J., dissenting) ("'preemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking'") (citations omitted); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 340 (2011) (Thomas, J., concurring in the judgment) (rejecting "purposes-and-objectives pre-emption as inconsistent with the Constitution because it turns entirely on extratextual 'judicial suppositions'").

As the opinion recognizes, the requisite "irreconcilable" conflict with the purposes of the ADA Title II and RHA § 504 is utterly lacking here. AECOM's brief suffuses with hyperbole about the opinion somehow being "detrimental" to disabled persons and somehow contravening the goal of preventing non-ADA-compliant public facilities from being built in the first

place. (*See*, *e.g.*, AECOM Br. 2, 6, 9.) The exact opposite is true. As the opinion explains, "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*." (Pet. App. 17, emphasis added.)

As the opinion further recognizes, most disabled plaintiffs in ADA Title II cases will only sue the municipality. (Pet. App. 14 n.2.) So, any finding that third-party claims against a facility's builders or designers are preempted, would let the contractors in the best position to ensure public facilities are properly constructed in the first place "shield themselves from any liability they caused under both state contract law and federal disability regulations . . . ." (*Id.* at 13.)[5] Thus, as

[5] AECOM sweepingly asserts – without any authority or anything even remotely establishing the requisite "irreconcilable" conflict – that letting municipalities bring third-party contractual contribution claims will somehow "impos[e] serious burdens" on plaintiffs who only sued the municipality, by making litigation more complex. (AECOM Br. 10.) Nonsense. If an ADA plaintiff chooses to sue only the deep-pocket municipality, as usually happens, letting the municipality bring a third-party complaint against other alleged wrongdoers may complicate the lawsuit *for the municipality*, but it changes nothing for the plaintiff. The ADA plaintiff still only needs to prove his/her case against the municipality, which the plaintiff typically does by doing what the plaintiffs did here – by hiring an ADA expert to prepare a report

the opinion holds, "[a]llowing 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." (*Id.* at 24.) Instead, the opinion continues, it is the preemption arguments of Tutor Perini and AECOM that pose such an obstacle:

> [F]inding [the City's contractual contribution] 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.

(*Id*. at 24.)

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detailing what is in non-compliance and what must be fixed. Indeed, the plaintiffs have settled their claims with the City. All that remains are the City's third-party claims seeking to hold AECOM and Tutor Perini accountable for their predecessors' wrongdoing.

B. In Suggesting The Opinion Somehow Conflicts With *Northwest*, Petitioner Erroneously Conflates Implied-Remedy And Preemption Law.

In trying to conjure a basis for review, Tutor Perini claims that the Ninth Circuit's opinion "calls into question" this Court's decision in *Northwest*, 451 U.S. 77, "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." (Pet. 8.) Tutor Perini argues that, "as this Court held in *Northwest*, the lack of any reference in the ADA to indemnification or contribution precludes any implication that these remedies exist under the ADA." (Pet. 21.)

The argument is a red herring. Tutor Perini mistakenly conflates implied-remedy law with the law of preemption. *Northwest* was not a preemption case. It addressed the entirely distinct issue of whether a court *can imply a federal remedy* into a comprehensive statutory scheme when Congress never expressly provided for that remedy. *See* 451 U.S. at 93-94. This case, in contrast, is a preemption case – it concerns contractual contribution under state law. *Northwest* is irrelevant.

The Ninth Circuit's opinion does not discuss whether some undefined "indemnification" or "contribution" right should be implied as a federal remedy into the ADA or RHA, let alone actually create any such "new private remedy." It solely addresses whether

Congress intended *to preempt* a municipality's contract claims for limited construction indemnity that are specifically authorized by state statutes and that codify state public policy. That is a fundamentally different question. *See*, *e.g.*, *Bowers v. NCAA*, 346 F.3d 402, 430 (3d Cir. 2003) (finding no basis to imply a right of contribution into ADA Title II, but stating "we may assume that a defendant in a traditional common law breach of contract case would be entitled to contribution"); *Baker, Watts*, 876 F.2d at 1107-08 (finding no implied right of indemnification or contribution in the Securities Act of 1933 but also finding Maryland state-law contribution claims were *not* preempted).

By mixing preemption apples with implied-remedy oranges, Tutor Perini flips preemption standards on their head. Tutor Perini touts congressional silence on an issue or remedy as a reason to *find* preemption, emphasizing *Northwest*'s language that "'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.'" (Pet. 20 (quoting *Northwest*, 451 U.S at 94) (emphasis added).) But *Northwest* discusses the implied-remedy standard, *not* the preemption standard.

Tutor Perini fails to recognize that the presumption in *all* contexts is that Congress will state its intentions *expressly* (either in a statute or legislative history) and that silence therefore indicates Congress *did not* intend to do something. *See Northwest*, 451 U.S. at 97 (referring to "[t]he presumption that a remedy

was deliberately omitted from a statute"). That is as true for preemption as it is for implied-remedy law. As previously noted, this Court's "'pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as preempting state law.'" *Wyeth*, 555 U.S. at 603 (Thomas, J., concurring in the judgment). While a statute's comprehensive nature may be a reason to *refuse to imply a federal remedy*, it also is a reason to *refuse to find preemption*. Under this Court's preemption precedent, matters that a comprehensive statute did not expressly address "are presumably left subject to the disposition provided by state law." *O'Melveny*, 512 U.S. at 85.

The opinion does not, in any shape or form, conflict with *Northwest*, let alone with any of this Court's precedent that actually addresses preemption. The opinion is entirely consistent with this Court's precedent, in every respect. There is no issue for review.

CONCLUSION

Respondent City of Los Angeles respectfully submits that the petition for a writ of certiorari should be denied. There is no circuit conflict, nor even any meaningful conflict with any state or lower federal court

decision. The opinion's well-reasoned analysis follows, rather than conflicts with, this Court's preemption precedent.

Respectfully submitted,

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