Case No. 15-56606

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF LOS ANGELES, a municipal corporation,

Third-party-plaintiff and Appellant,

v.

AECOM SERVICES, INC. and
TUTOR PERINI CORPORATION,

Third-party-defendants and Appellees

On Appeal From The United States District Court
For The Central District of California
The Honorable S. James Otero, Presiding Judge
Case No. 2:13-cv-04057-SJO-PJW

APPELLANT'S OPENING BRIEF

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JURISDICTION

Disabled individuals sued appellant City of Los Angeles ("City") and a bus supplier for alleged violations of the Americans with Disabilities Act (42 U.S.C. §§ 12132, 12181 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 *et seq*.) and several California anti-discrimination laws. (Excerpts of Record ("ER"): 32-52.) The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a).

The City then filed a third-party complaint against appellees for breach of contract, express contractual indemnity and declaratory relief claims arising out of the same case and controversy. (ER:22-31.) The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a).

The district court entered a final judgment that resolved all claims as to all parties. (ER:2-4.) This Court has jurisdiction under 28 U.S.C. § 1291.

The district court entered the final judgment on October 8, 2015. (ER:2.) A week later, on October 15, 2015, the City filed a notice of appeal from the judgment. (ER:1.) The City's appeal is therefore timely under Federal Rules of Appellate Procedure 4(a)(1)(A).

ISSUE PRESENTED

When a municipality is sued because a public facility does not comply with Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, do those federal statutes preempt the municipality's state law claims for breach of contract and express contractual indemnity against the expert companies who designed and constructed that public facility and who contractually agreed to ensure compliance with those federal statutes and to indemnify the municipality for any losses caused by their non-compliance?

Here, the district court found preemption and dismissed the municipality's contract claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. No Circuit Court has addressed this preemption issue yet.

STANDARD OF REVIEW

Review is de novo. This Court reviews de novo a district court's dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). It also reviews preemption issues de novo because *preemption is a question of law*. *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005) (applying de novo

review to reverse district court's finding of preemption); *Williamson v. General Dynamics Corp*., 208 F.3d 1144, 1149 (9th Cir. 2000) (same).

A complaint cannot be dismissed under Rule 12(b)(6) unless it appears beyond any doubt that the plaintiff can prove no facts that would entitle it to relief. *Williamson*, 208 F.3d at 1149. The complaint's allegations of material fact must be taken as true and construed in the light most favorable to the plaintiff. *Parks*, 51 F.3d at 1484.

STATEMENT OF THE CASE

A. Disabled Individuals Sue The City Of Los Angeles For Violations Of ADA Title II, Section 504 Of The Rehabilitation Act And Multiple California Statutes, Alleging Accessibility Problems With The FlyAway Bus Facility In Van Nuys.

Two physically-disabled individuals, Alvin Malave and Julio Ochoa ("plaintiffs"), sued the City for violations of various federal and state disability laws regarding the City's FlyAway bus facility in Van Nuys and operation of the City's FlyAway bus service, a bus system that offers regularly-scheduled trips between the Los Angeles International Airport and various locations. (ER:32-52.) Among other things, plaintiffs alleged that the FlyAway bus facility in Van Nuys was not constructed in a manner that made it readily accessible and useable by persons with disabilities. (ER:41-43.) Plaintiffs also sued the company that

supplied and operated the busses (Bauer's Intelligent Transportation, Inc.). (ER:32-35.) They did not sue anyone else. (ER:32-52.)

Plaintiffs sued the City for violations of Title II of the Americans with Disabilities Act ("ADA") (42 U.S.C. §§ 12131 *et seq.*), Section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. §§ 794 *et seq.*), California's Disabled Persons Act (Cal. Civ. Code §§ 54 *et seq*.), and California Government Code section 11135. (ER:43-44, 47-50.)

Plaintiffs sought damages and attorney's fees. (ER:50-51.) They also sought an injunction ordering the City, among other things, to modify or alter the Van Nuys Flyaway facility to make it readily accessible and useable by persons with disabilities. (ER:50.)

B. The City Files Third-Party Claims Against Successor Corporations Of The Facility's Designer (Appellee AECOM) And Builder (Appellee Tutor), For Breach Of Contract, Express Contractual Indemnity And Declaratory Relief.

The City filed a third-party complaint against third-party defendants AECOM Services, Inc. ("AECOM"), Tutor Perini Corporation ("Tutor"), and two other companies. (ER:22-31.) The City's complaint alleged, in pertinent part, the following:

The dispute with plaintiffs Malave and Ochoa relates, in part, to "the design, construction and use" of the Van Nuys Flyaway bus facility because plaintiffs

allege that "the Flyaway facility is not readily accessible and usable by persons with disabilities, in violation of Title II of the Americans with Disabilities Act and similar laws." (ER:24.)

Third-party defendant AECOM is the successor in interest to the company that the City retained "to provide design and construction administration support services in connection with the construction of the Flyaway facility." (ER:24.) That company, among other things, "provided complete architectural, graphic, structural, mechanical and electrical design services, as well as prepared 100% complete Final Drawings along with the accompanying specifications." (ER:24.)

That company, in its contract with the City to provide those services, 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 [the company], its subcontractors, officers, agents, servants, employees, successors or assigns." (ER:24.) The contract specifically stated:

> **Section 13. <u>City Held Harmless</u>.**
>
> In addition to [an insurance provision] herein, Consultant undertakes and agrees to defend, indemnify and hold City . . . 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.

(ER:24-25) (emphasis added).

Third-party defendant Tutor is the successor in interest to the company that the City retained to construct the Van Nuys Flyaway facility, including "providing all materials, equipment and required work to completely construct [it]." (ER:25.) That company, in its contract with the City to provide those services, 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 [the contractor] or relating to acts or events pertaining to, or arising out of, the contract." (ER:25.) The contract specifically stated:

> **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 . . . 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*.

(ER:25-26) (emphasis added). That company also contractually agreed to comply with all state and federal laws, including the ADA, and to be responsible for any damages caused by its noncompliance with the ADA:

> **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.

(ER:26) (emphasis added).

Based on these contract provisions, the City's complaint alleged the following causes of action against AECOM and Tutor:

(1) **breach of contract**, for failing to provide the contractually-promised services "in an appropriate manner, including with regard to ensuring compliance with Title II of the [ADA] and other similar laws" (ER:28-29);

(2) **express contractual indemnity**, including defending, indemnifying and holding the City harmless for all damages, losses, settlements, attorney's fees or injunctions resulting from "their negligent or wrongful acts in connection with the performance of their contracts with the City," including the plaintiffs' claims (ER:29-30); and

(3) **declaratory relief**, seeking a judicial determination as to their obligations to defend, indemnify and hold the City harmless from the plaintiffs' claims (ER:30).

C. The District Court Dismisses The City's Third-Party Claims Against AECOM And Tutor, Concluding The ADA Preempts The Claims.

Third-party defendant Tutor moved to dismiss the City's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (District Court Docket No. ("Dk:__") 56.) Tutor argued that ADA Title II and Section 504 preempted the claims, relying primarily on *Independent Living Ctr. of Southern California v. City of Los Angeles*, 973 F. Supp. 2d 1139 (C.D. Cal. 2013), a district court decision that Tutor characterized as "directly on point." (ER:18-19; Dk. 56-1, p. 7.) *Independent Living Ctr*. involved discriminatory-housing claims against the City of Los Angeles and owners of multi-family residential properties who received federal and state redevelopment funds from the City; the district court found that the ADA and Section 504 preempted the City's cross-claims for indemnification and contribution against the property owners. 973 F. Supp. 2d at 1158.

The district court granted Tutor's motion, concluding the ADA preempted the City's contract claims. (ER:15-21.) Relying solely on *Independent Living Ctr*., 973 F. Supp. 2d 1139, the court concluded that the presumption against preemption does not apply to the ADA. (ER:19.) The court also found that of the three forms of preemption—express, field and conflict—field preemption applied

because "'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.'" (ER:20, quoting a non-preemption case, *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (*Garrett*)). The district court further concluded that the City's contract claims were not independent of the ADA, that they were derivative of the City's ADA liability, and that allowing the City "to allocate the risk of loss to its contractors for the bus terminal at issue" would let the City insulate itself from ADA liability and "be at odds with the intent of the ADA." (ER:20.)

The City requested leave to amend its third-party complaint to allege that Tutor's contract "also contained independent specifications regarding standards for construction of the bus terminal." (ER:20.) The district court denied leave to amend, concluding "[a]ny claim for indemnification of the ADA claims would be preempted, and any claims unrelated to the ADA claims would not warrant this Court's exercise of supplemental jurisdiction." (ER:21.)

After the district court dismissed the City's claims against Tutor, the City and AECOM stipulated that the court could determine the viability of the City's claims against AECOM based upon Tutor's 12(b)(6) motion because AECOM was asserting the same preemption defense. (ER:12-14.) Based upon the papers submitted on Tutor's motion, the district court issued a 12(b)(6) order that adopted the AECOM/City stipulation and dismissed the City's claims against AECOM without leave to amend. (ER:5-11.) Except for the court switching the name of

the third-party defendant, the AECOM order mirrors the Tutor order. (ER:5-11, 15-21.)

D. The District Court Enters Final Judgment; The City Appeals.

The district court dismissed the claims of plaintiffs Malave and Ochoa pursuant to settlements with the City and the bus-company defendant. (ER:3; Dks. 31, 33, 74, 80, 82.) The court also dismissed the City's claims against all other remaining third-party defendants pursuant to settlement and another motion. (ER:3; Dks. 77, 81, 83, 92.) Having resolved all claims against all parties, the court entered a final judgment. (ER:2-4.)

The City then filed this appeal, contesting the preemption-based dismissal of its claims against Tutor and AECOM. (ER:1.)

SUMMARY OF ARGUMENT

The City is not in the construction business. So, to ensure that the Van Nuys Flyway facility would be built in compliance with the ADA and Section 504, the City did the only thing it realistically could do: It retained an expert designer (appellee AECOM) and an expert builder (appellee Tutor), who contractually agreed to design/construct a compliant facility and to indemnify the City against any losses caused by the contractors' own wrongdoing. The district court's finding that the ADA preempts the City from suing the appellees for failing to design/construct a compliant facility effectively immunizes appellees from their

own statutory violations and lets them nullify their contractual promises after the fact. The preemption ruling is wrong as a matter of law and must be reversed under this Court's de novo review.

The district court's preemption ruling rests on two false predicates.

First, the court found that the well-established presumption against preemption does not apply to the ADA, relying solely on *Independent Living Ctr.*, 973 F. Supp. 2d 1139. But *Independent Living Ctr.* based that conclusion on irrelevant language from inapposite, non-preemption cases. Abundant Supreme Court and Ninth Circuit precedent dictates that courts must *always* start with the presumption that Congress did *not* intend to preempt state law claims, and that the presumption applies *with particular force* where, as here, the state-law claims protect state citizens against discrimination, impact the health and safety of state citizens, and involve the enforcement of contracts. To overcome the presumption against preemption, the appellees—who bear the burden of proof—needed to make a clear and manifest showing that Congress intended preemption. They did not and cannot.

Second, the district court recognized that Congress did not expressly preempt the City's claims but then found that Congress intended for the ADA to occupy the entire field of anti-disability-discrimination law. The court's finding of field preemption is irrefutably wrong. The ADA specifically states that it does not invalidate or limit any state law remedies or rights that provide equal or greater

protection. That provision conclusively demonstrates that Congress did *not* intend to occupy the entire field.

As a result, conflict preemption is the only even remotely conceivable basis to find preemption here. But conflict preemption entails a high threshold. There must be an actual, irreconcilable conflict between the state law claims and the purposes and objectives of the ADA and Section 504. Courts violate the constitution if they find conflict preemption based upon their own policy suppositions, rather than simply trying to discern Congress's clear, actual intent.

The appellees cannot surmount this high threshold. Their conflict-preemption argument rests entirely on congressional silence—the contention that the statutory language and legislative history do not address indemnification or the preemption of contract claims, so courts should infer that Congress intended preemption. The exact opposite is true. Congress certainly knew that municipalities would have to rely on contractors to construct or refurbish public facilities in compliance with the ADA's accessibility requirements. Congress's failure to raise any concerns about municipalities suing contractors indicates that Congress did not intend preemption. Moreover, ADA regulations and related agency interpretations likewise indicate that Congress did not intend to preempt the City's claims.

In addition, allowing municipalities to pursue claims against contractors does not irreconcilably conflict with the purposes and objectives of the ADA and Section 504. To the contrary, such claims actually *further* those goals. As this

case exemplifies, plaintiffs in ADA Title II cases typically sue only the deep-pocket municipality, rather than unnecessarily complicating their lawsuit by suing contractors. Barring municipalities from pursuing their contractors effectively immunizes the contractors from their own wrongdoing. And reducing contractors' exposure to civil claims and penalties directly undermines the ADA's purpose of ensuring facilities are readily accessible to the disabled, by decreasing contractors' incentives to ensure quality work and full statutory compliance. On the other hand, allowing municipalities to sue the contractors who were retained to, and contractually promised to, design and construct compliant facilities ensures that the parties *best positioned* to ensure public facilities are constructed correctly *in the first place* have full incentive to do their job correctly.

A municipality's ability to seek recourse against those contractors does not mean that the municipality is effectively immunized for ADA/Section 504 violations or that the municipality has less reason to prevent statutory violations. A municipality, even where it has a potential claim for indemnity or contribution, always remains responsible in the first instance for any public facilities that violate the ADA or Section 504. That means there is always a deep pocket to cover damages and a financially-viable entity to comply with any injunctive relief necessary to correct deficiencies. Allowing municipalities to sue contractors does not undermine, let alone irreconcilably conflict with, the purposes of the ADA or Section 504. It simply ensures that *all* entities and individuals responsible for non-

compliance can be brought into the lawsuit and held accountable for their wrongdoing.

Finally, the district court relied on a Fourth Circuit case, *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597 (4th Cir. 2010), which is the only Circuit decision to date that has addressed ADA preemption. That case, however, did not involve ADA Title II claims. In any event, as we will demonstrate below, that case's analysis and the Fourth Circuit precedent it relies upon actually support a finding of "no preemption" here.

The appellees cannot meet any of the three preemption standards—express, field or conflict. The City's claims are not preempted. The judgment in favor of third-party defendants Tutor and AECOM must be reversed.

ARGUMENT

I. THE PRESUMPTION AGAINST PREEMPTION APPLIES TO THE CITY'S STATE-LAW CONTRACT CLAIMS.

A. The Presumption Is That Congress Did Not Intend To Preempt State Law Claims.

"'[T]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (*Lohr*) (citations omitted). But the presumption is that

Congress did *not* intend to preempt state law claims. *Id*.; *Gonzalez v. Arizona*, 677 F.3d 383, 390 (9th Cir. 2012).

"[B]ecause the States are independent sovereigns in our federal system, [courts] have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Lohr*, 518 U.S. at 485. Courts therefore "'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*. (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). This presumption "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977) (citation omitted). Thus, "courts deciding whether a particular state law is preempted under the Supremacy Clause must strive to maintain the 'delicate balance' between the States and the Federal Government. . . . Only where the state and federal laws cannot be reconciled do courts hold that Congress's enactments must prevail." *Gonzalez*, 677 F.3d at 392.

Two practical considerations underlie the presumption: "First, Congress has the power to make preemption clear in the first instance. Second, if the court erroneously finds preemption, the State can do nothing about it, while if the court errs in the other direction, Congress can correct the problem." *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941, 943 (9th Cir. 1992).

B. The District Court Erred In Ruling That The Presumption Does Not Apply To The ADA: The Presumption *Particularly* Applies Here Because The State-Law Claims Involve Anti-Discrimination, Health And Safety, And Contract Enforcement.

The district court concluded that "[a]s to the ADA, the presumption against preemption does not apply." (ER:9, 19.) It based that conclusion on assertions that Congress "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*. The court's no-presumption conclusion was wrong, for multiple reasons.

1. The presumption *always* applies and applies with *particular force* in traditional state-law fields.

The district court failed to recognize that the presumption against the preemption of state police power applies "[i]n *all* pre-emption cases." *Lohr*, 518 U.S. at 485 (emphasis added); *accord*, *Wyeth v. Levine,* 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. E. 2d 51 (quoting *Lohr*); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (*Travelers*) (notwithstanding the variety of "opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law"); *Dilts v. Penzke Logistics LLC,* 769 F.3d 637, 642-43 (9th Cir. 2014)

("'Preemption analysis begins with the presumption that Congress does not intend to supplant state law.'").

The district court apparently concluded that the presumption applies *only* where the federal statute involves an area that has "historically been a field of state law." (ER:9, 19.) But the basic presumption *always* applies and instead applies with *particular force* when the federal statute involves a traditional field of state law. *See Lohr*, 518 U.S at 485 ("[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 . . .'") (emphasis added); *Wyeth*, 555 U.S. at 565 (quoting *Lohr*); *Altria Group Inc. v. Good*, 555 U.S. 70, 77, 129 S. Ct. 538, 172 L. Ed. 2d 398 (the presumption "applies *with particular force when* Congress has legislated in a field traditionally occupied by the States") (emphasis added); *Dilts*, 769 F.3d at 643 (Ninth Circuit emphasizing *Wyeth*'s holding that "the presumption against preemption applies 'in all preemption cases' and is *especially strong* in areas of traditional state regulation") (emphasis added).

2. The presumption particularly applies to the anti-discrimination field.

The presumption particularly applies here because the district court got the issue exactly backwards in asserting "anti-discrimination statutes have not historically been a field of state law." (ER:9, 19.) Anti-discrimination *has* historically been a state-law field. Anti-discrimination has never been a uniquely federal concern; states have long enacted statutes protecting their citizens from

discrimination, rather than simply relying on federal law. *See Kroske*, 432 F.3d at 981 (laws prohibiting/remedying discrimination are within "the State's historic police powers"); *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1274 (1st Cir. 1993) (same); *Bob-Lo Excursion Co. v. People of State of Mich.*, 333 U.S. 28, 33, 68 S. Ct. 358, 92 L. Ed. 455 (1948) (noting Michigan civil rights act is "one of the familiar type enacted by many states"); *id.* at 41 (Douglas, J., concurring) (noting a state's power is adequate to protect "the civil rights of its citizens against discrimination"); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109, 73 S. Ct. 1007, 97 L. Ed. 1480 (1953) (legislation prohibiting discrimination in use of public facilities "is within the police power of the states").

For example, for well over a century California has repeatedly enacted—and repeatedly enhanced—statutes that proscribe and remedy discrimination against its citizens. *See, e.g.*, Cal. Civ. Code §§ 51, 53, 54, 54.1; Cal. Gov't Code §§ 11135, 12920, 12940, 12955; Cal. Lab. Code § 1735.

That the federal government also has long addressed discrimination "does not by itself defeat the application of the presumption. Rather, [the presumption's] application 'accounts for the historic presence of state law but does not rely on the absence of federal regulation.' *Wyeth*, 129 S. Ct. at 1195 n.3; *see also Lohr*, 518 U.S. at 475–77, 485, 116 S. Ct. 2240 (applying the presumption despite the decades-long history of federal regulation of public health and safety)." *Farina v. Nokia, Inc.*, 625 F.3d 97, 116 (3d Cir. 2010); *accord*, *Pacific Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1166-67 (9th Cir. 2011). Thus, although the

presumption against preemption does not apply to fields that are uniquely federal[1] or where state law has traditionally been absent,[2] those limitations are irrelevant here. *See Kroske*, 432 F.3d at 981 (even though case involved banking regulations and "there is a significant federal presence in the regulation of national banks," the Ninth Circuit applied the presumption against preemption to a state-law age discrimination claim because that law "was enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds"); *Pacific Merchant Shipping Ass'n*, 639 F.3d at 1166-67 (applying presumption where both federal government *and* states have historically occupied field).[3]

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[1] *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001) (presumption not applicable to state claims "[p]olicing fraud against federal agencies"; "the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law").

[2] *See, e.g.*, *United States v. Locke*, 529 U.S. 89, 99, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000) (*Locke*) (in the area of national/international maritime commerce, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers" because "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme" and the Federalist papers cited Congress' ability to regulate interstate navigation without state intervention as a reason to adopt the Constitution).

[3] The district court quoted *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) for the proposition that the presumption "'usually does not apply'" when the state regulates in an area with "'a history of significant federal presence.'" (ER:9, 19.) But *Ting* merely quoted/relied on *Locke*, a maritime law case (see n.2, *ante*), and the Supreme Court subsequently explained in *Wyeth* that the presumption's application depends on the presence of state law, not the absence of federal law. *See Wyeth*, 555 U.S. at 565 n.3 (post-*Locke* case applying presumption even

3. The presumption particularly applies to disability law.

The presumption particularly applies even focusing specifically on disability law, not "anti-discrimination" law in general. *See Ellenwood*, 984 F.2d at 1274 (applying presumption against preemption in finding that the federal Rehabilitation Act of 1973 did not preempt "State handicap discrimination statutes"); Charles Daugherty, *Who Needs Contract Law?–A Critical Look At Contractual Indemnification (Or Lack Thereof) In FHAA And ADA "Design And Construct Cases,"* 44 Ind. L. Rev. 545, 575 (2011) ("*Who Needs Contract Law?*") ("Accessibility law is by no means exclusively a federal affair. Most states have some form of accessibility standards, many of which are more rigorous than the . . . ADA mandates.").

As the Supreme Court recognized in *Garrett*, 531 U.S. 356, discussing laws requiring "special accommodations for the disabled," "by the time that Congress enacted the ADA in 1990, *every State in the Union* had enacted such measures" and "[a]t least one Member of Congress remarked that 'this is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny.'" *Id.* at 368 & n.5 (emphasis added). Thus, far from the ADA constituting the first effort to legislate disability protection, Congress was late to

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though federal government had regulated drug labeling for over a century); *Union Pac. R.R. Co. v. California Public Utilities Comm'n*, 346 F.3d 851, 864 n.17 (9th Cir. 2003) (emphasizing *Locke* involved maritime law, "which has been *almost exclusively* federally regulated since the Founding") (emphasis added); *Meilleur v. AT&T, Inc.*, No. C11-1025 MJP, 2011 WL 5592647, *3 (W.D. Wash. Nov. 16, 2011) (recognizing that "*Ting* has little continued application in light of *Wyeth*").

the party. By 1990, the states had already occupied the disability-discrimination field. *Id.*; *see also Jankey v. Lee*, 290 P.3d 187, 193-95 (Cal. 2012) (discussing ADA legislative history recognizing that the states had already enacted their own anti-disability discrimination laws by the time of the ADA's enactment and Congress sought not to invalidate any state laws affording equal/greater protection than the ADA).

California was no exception. *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."). By 1990, California had numerous statutes protecting the disabled.[4] The plaintiffs here sued the City under two of them—the Disabled Persons Act and Government Code section 11135. (ER:48-50.)

[4] *See*, *e.g.*, Cal. Civ. Code § 54 *et seq.* (Disabled Persons Act, enacted in 1968 by Cal. Stats. 1968, ch. 461, p. 1092, § 1); Cal. Lab. Code § 1735 (public works discrimination; disability reference added in 1976 by Cal. Stats. 1976, ch. 1174, p. 5270, § 1); Cal. Gov't Code §§ 11135 (no disability discrimination in programs/activities conducted, operated or wholly/partly funded by state, enacted in 1977 by Cal. Stats. 1977, ch. 972, p. 2942, § 1); Cal. Gov't Code §§ 12920, 12921, 12940, 12955 (employment/housing discrimination against disabled, enacted in 1980 by Stats. 1980, ch. 992, § 4); Cal. Civ. Code § 51 et seq. (Unruh Civil Rights Act, disability reference added in 1987 by Cal. Stats. 1987, ch. 159, § 1); Cal. Civ. Code § 53 (discriminatory real property instruments; disability reference added in 1987 by Cal. Stats. 1987, ch. 159, § 5).

4. The presumption particularly applies to health and safety issues.

Disability statutes do not just address discrimination. They also protect the health and safety of disabled persons. This is yet another reason why the presumption against preemption applies.

"[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern" and courts therefore presume "that state and local regulation related to matters of health and safety can normally coexist with federal regulations . . . ." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718-19, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985); *accord*, *Lohr*, 518 U.S. at 475 (states historically have "exercised their police powers to protect the health and safety of their citizens" and "'traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons'"). Thus, "courts should be especially unlikely to find preemption of state laws" that impact health and safety. *Chemical Specialties Mfrs. Ass'n.*, 958 F.2d at 943; *accord*, *Puente Arizona v. Arpaio*, __ F.3d __, Nos. 15-15211, 15-15213, 15-15215, 2016 WL 1730588, *3 (9th Cir. May 2, 2016) (applying presumption against preemption to identity theft laws despite effects on immigration, because the laws impact the health and safety of Arizona citizens).

Where state-law claims impact health and safety, the party claiming preemption "bear[s] the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" *De Buono v.*

NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806, 814, 177 S. Ct. 1747, 138 L. Ed. 2d 21 (quoting *Travelers*, 514 U.S. at 654).

5. The presumption particularly applies to contract enforcement.

Finally, the state-law claims at issue here involve the enforcement of contracts, which is another field within the traditional domain of state law. *See G.S Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc*., 958 F.2d 896, 906 (9th Cir. 1992) (presumption against preemption applies to "'common law tort and contract remedies in business relationships'" because those are fields "'traditionally occupied by the states'") (citations omitted); *Aronson v. Quick Point Pencil Co*., 440 U.S. 257, 262, 99 S. Ct. 1096, 59 L. Ed. 2d 296 (1979) ("Commercial agreements traditionally are the domain of state law"); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 174, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982) (Rehnquist, J., dissenting) (same).

In sum, the district court's decision that the presumption against preemption does not apply to the ADA contravenes longstanding preemption precedent and principles. The presumption applies to the City's claims.

C. *Independent Living Ctr.*'s Erroneous No-Presumption Holding Rests On Inapposite Cases.

In concluding that the presumption against preemption does not apply to the ADA, the district court relied entirely on *Independent Living Ctr*., 973 F. Supp. 2d

1139. (ER:9, 19.) Although *Independent Living Ctr*. refused to apply the presumption, 973 F. Supp. 2d at 1158, the decision did not discuss, let alone rely on, any preemption precedent. It instead merely quoted language from three non-preemption cases and then stated that since the defendant "fail[ed] to cite to any authority holding otherwise . . . the court will not apply a presumption against preemption." *Id.* The court was wrong. The three cases it cited are wholly inapposite. None addresses preemption, let alone defeats the presumption against preemption.

City of Oakland: Relying on language in *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir. 1996) (*City of Oakland*) that "'[p]rivate causes of action against state actors who impair federal civil rights have not traditionally been relegated to state law,'" *Independent Living Ctr.* concluded that "the states have not traditionally occupied the field of anti-discrimination law." 973 F. Supp. 2d at 1157. The district court here incorporated that statement into its preemption ruling. (ER:9, 19).

But *City of Oakland* did not actually say that the states have not traditionally enacted anti-discrimination laws nor traditionally occupied the anti-discrimination field. Nor did the case even remotely involve or address preemption. Instead, *City of Oakland* solely addressed whether an amendment to the Civil Rights Act of 1991 impliedly created a private right of action against municipalities for the violation of the civil rights guaranteed by 42 U.S.C. § 1981. *See City of Oakland,* 96 F.3d at 1205. The Ninth Circuit found an implied right of action after applying

the multi-factored, implied-remedy test of *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), which includes as one factor, "[i]s the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?" *City of Oakland*, 96 F.3d at 1210.

It was in assessing that factor that the Ninth Circuit made the comment that *Independent Living Ctr.* emphasized—that "[p]rivate causes of action against state actors who impair federal civil rights have *not* been traditionally relegated to state law." *City of Oakland*, 96 F.3d at p. 1214 (emphasis in original). But the Ninth Circuit was simply noting, in deciding whether *to imply a right of action* under a federal civil rights statute, whether state law has primarily handled state actors "who impair *federal civil rights*." *Id.* (emphasis added). The Court was not addressing whether states have enacted their *own state* civil rights or anti-discrimination laws. The fact that claims for violating *federal* civil rights have not traditionally been relegated to state laws or state courts does not mean that states have not traditionally exercised their police powers to enact and enforce *their own* anti-discrimination statutes. As shown above, they have.

In importing *City of Oakland*'s implied-remedy commentary into a preemption discussion, *Independent Living Ctr*. mixed apples and oranges. Whether an implied right of action should exist under a federal statute is a different question than whether an existing federal cause of action preempts state-law claims. *City of Oakland* is inapposite.

Lane*/*Garrett. *Independent Living Ctr.* also based it no-presumption holding on snippets from two Supreme Court cases: (1) language from *Tennessee v. Lane*, 541 U.S 509, 524-25, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004) (*Lane*) noting that Congress enacted ADA Title II because state agencies, not just private parties, had discriminated against the disabled; and (2) language in *Garrett*, 531 U.S. at 374, that "'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.'" *See* 973 F. Supp. 2d at 1158.

But again, neither case involved or addressed preemption. *Garrett* merely held that the Eleventh Amendment barred private suits for damages for state violations of Title I of the ADA. *See* 531 U.S. at 360. And *Lane* merely held that Title II of the ADA was a valid exercise of Congress's enforcement powers under the Fourteenth Amendment, at least insofar as it applied to the right of access to courts. 541 US. at 513. Those issues have nothing to do with preemption.

At most, the case snippets simply recognize reasons why Congress enacted the ADA. But the need for a national mandate is never, by itself, a basis for finding preemption, let alone for defeating the presumption against preemption: "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Hillsborough*, 471 U.S. at 719. Pre-emption should not be inferred simply because federal statutes or regulations "are comprehensive." *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 149,

107 S. Ct. 499, 93 L. Ed. 2d 449 (1986); *accord*, *Hillsborough*, 471 U.S. at 717 (quoting *New York Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 93 S. Ct. 2507, 37 L. Ed. 2d 688 (1973) (*Dublino*)) ("'[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem'").

The language that *Independent Living Ctr.* emphasized does not address what matters for presumption purposes—whether states have exercised their police powers to legislate/regulate in the area. As previously noted, *Garrett* actually *supports* application of the presumption, by recognizing that by the time Congress enacted the ADA in 1990 each state had already enacted its own "special accommodations for the disabled" and the states were "'so far out in front of the Federal Government, it's not funny.'" *Garrett*, 531 U.S. at 368 & n.5. *Lane* likewise recognizes prior state efforts. *See, e.g.*, 541 U.S at 526 (acknowledging prior "state legislative efforts" addressing disability discrimination in state programs), 546 (noting observation of ADA Senate Report "that '[a]ll states currently mandate accessibility in newly constructed state-owned public buildings'").

Independent Living Ctr.'s conclusion that the presumption against preemption does not apply to the ADA rests on irrelevant snippets from inapposite, non-preemption cases. The conclusion is wrong and contrary to abundant preemption precedent. In following *Independent Living Ctr.*'s erroneous no-

presumption holding (ER:9, 19), the district court here predicated its preemption ruling on a faulty cornerstone. The court should have started, and this Court must start, with the presumption that Congress did *not* intend for the ADA to preempt the City's state-law claims.

The presumption against preemption applies to the ADA. That presumption prevails absent a "clear and manifest" showing that Congress intended preemption. *Lohr*, 518 U.S. at 485; *Williamson*, 208 F.3d at 1150 ("'Congressional intent to preempt state law must be clear and manifest'"); *Puente Arizona*, 2016 WL 1730588 at *3 (same). As we now demonstrate, appellees cannot meet that burden.

II. THE CIRCUMSTANCES DO NOT MEET ANY OF THE THREE PREEMPTION STANDARDS.

A. The Three Preemption Standards: Express, Field And Conflict.

Under the Supremacy Clause, federal law may supersede state law in three different ways. *Hillsborough*, 471 U.S. at 713; *Kroske*, 432 F.3d at 981. The party claiming preemption bears the burden of presenting evidence sufficient to meet one of the three standards. *Dilts*, 769 F.3d at 649 (citing *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 131 S. Ct. 2567, 2587, 180 L. Ed. 2d 580 (2011)).

Express preemption: "[W]hen acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms." *Hillsborough*, 471 U.S. at 713.

Field preemption: "In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough*, 471 U.S. at 713 (quoting *Rice*, 331 U.S. at 230). "Pre-emption of a whole field also will be inferred 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*, 471 U.S. at 713 (quoting *Rice*, 331 U.S. at 230).

Conflict preemption: "Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a 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, 142-143, 83 S. Ct. 1210, 1217-1218, 10 L. Ed. 2d 248 (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, 61 S. Ct. [399,] 404 [(1941)]." *Hillsborough*, 471 U.S. at 713.

B. There Is No Express Preemption.

Had Congress intended for the ADA or Section 504 to preempt state-law claims, including indemnification claims or contract claims, it easily could have said so. But neither statute contains any preemption clause. *Compare* 29 U.S.C. § 1144(a) (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"). There is no express preemption. The appellees have never contended otherwise.

C. There Is No Field Preemption.

Of the two forms of implied preemption—field and conflict—field preemption is irrefutably inapplicable. That's because the ADA *expressly* recognizes that it does *not* occupy the entire field of disability discrimination.

The ADA 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).

This language precludes a finding of field preemption. It is well settled that where Congress has specified that a federal act does not invalidate or limit *all* state laws or remedies, Congress has *not* occupied the entire field and field preemption is inapplicable. *See, e.g.*, *Jankey v. Lee*, 290 P.3d at 193 (the ADA's construction

clause "disavows any broad preemptive intent, instead permitting states to enact and enforce complimentary laws"); *Ellenwood*, 984 F.2d at 1277 (noting the ADA expressly does not foreclose all state disability laws); *Anderson v. Martin Brower Co*., No. 93-2333-JWL, 1994 WL 398241, *2 (D. Kan. July 22, 1994) (the ADA's construction clause "clearly and expressly evidences an intent on the part of Congress not to preempt or foreclose state remedies"); *In re NOS Communications, MDL No. 1359*, 495 F.3d 1052, 1058 (9th Cir. 2007) (a provision expressly allowing certain state laws or remedies "is fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field . . . there would be nothing . . . to 'save,' and the provision would be mere surplusage"); *Farina*, 625 F.3d at 121 (such provisions "indicate Congress envisioned some role for state law in the field").[5]

The ADA's Title II regulations further confirm there is no field preemption. Those regulations mirror the ADA by stating that they do "not invalidate or limit the remedies, rights, and procedures of . . . State or local laws (including State common law) that provide greater or equal protection for the rights of individuals

[5] *See also Williamson*, 208 F.3d at 1151 (clause allowing states/municipalities to enact stricter laws "is evidence that Congress did not intend to preempt the entire field," even where the statute provides "a comprehensive remedy"); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995) (inclusion of "provision expressly not preempting certain state laws . . . makes it clear that Congress did not intend to 'occupy the field'"); *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828, 839 (N.D. 2006) (provision that federal act does not "preclude enforcement of all state laws within its subject matter . . . clearly expresses the intent of Congress that the [Act] was not meant to wholly occupy the field within its subject matter, and was not intended to preempt all state law affecting the same subject").

with disabilities or individuals associated with them." 28 C.F.R. § 35.103(b) (2015). Agency commentary likewise recognizes the lack of field preemption:

> We also would point out that the ADA does not assert any blanket preemptive authority over state or local nondiscrimination laws and enforcement mechanisms. While requirements of the ADA and this regulation would preempt conflicting state or local provisions . . ., the ADA and this rule do not prohibit states and localities from legislating in areas relating to disability. . . . [S]tates and localities may continue to enforce their own parallel requirements.

49 C.F.R. § 37, App. D, p. 444 (2015) (Department of Transportation comments); *see also* 28 C.F.R. § 35, App. B, p. 678 (2015) (Congress "did not intend to displace any of the rights or remedies provided by" state statutory or common law providing equal or greater protection, such as tort claims) (Department of Justice comments).

Here, the appellees never even argued field preemption. (*See* Dk. 56-1.) And the plaintiffs acknowledged that there is no field preemption by suing the City under California statutes—Government Code section 11135 *et seq*. and the Disabled Persons Act (Cal. Civ. Code § 54 *et seq*.)—based upon the same facts as their federal claims. (ER:48-50.) Instead, the district court *sua sponte* found field preemption. (ER:9, 20.) But the court completely ignored the ADA's construction provision, which refutes the court's conclusion. A statute's plain wording "'necessarily contains the best evidence of Congress' preemptive intent.'" *Sprietsma v Mercury Marine*, 537 U.S. 51, 62-63, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002).

Instead of addressing the ADA's actual language, the district court found field preemption based solely on the statement in *Garrett*, a non-preemption case, that "'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.'" (ER:9, 20, quoting *Garrett*, 531 U.S. at 374.) As explained previously, a statute's comprehensiveness is never a sufficient basis, by itself, to find preemption. *See* pp. 26-27, *ante*; *Dublino*, 413 U.S. at 415 (rejecting argument that "pre-emption is to be inferred merely from the comprehensive character of the federal [program]"); *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1208 (9th Cir. 2009) ("'Pre-emption should not be inferred . . . simply because the agency's regulations are comprehensive'") (quoting *R.J. Reynolds*, 479 U.S. at 149); *Hillsborough*, 471 U.S. at 718 ("Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety").[6]

[6] The district court did not find any preemption under Section 504. But given the Rehabilitation Act's narrower focus than the ADA, field preemption is even more inapplicable to that Act than the ADA. *See*, *e.g.*, *Ellenwood*, 984 F.2d at 1274-78 (finding no field preemption under the Rehabilitation Act); *Martin Marrietta Corp. v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1404 (4th Cir. 1994) (following *Ellenwood*); *Avington, ex rel A.V.A. v. Independent School Dist. No.1*, Nos. 04-CV-0887-CVF-PJC & 05-CV-0166-CVE-PJC, 2006 WL 3097391, *2 n.2 (N.D Okla. Oct. 30, 2006) ("Courts have not found that the Rehabilitation Act completely occupied the field of disability discrimination, and state law in this area is not preempted.").

Far from the ADA indicating that "Congress's clear and manifest purpose was preemption of the entire field of state law," *Kroske*, 432 F.3d at 983, the ADA's construction provision establishes the exact opposite: Congress did *not* intend to occupy the entire disability field. Consequently, conflict preemption is the only conceivable basis for preemption.[7]

D. There Is No Conflict Preemption.

Since express and field preemption are not even remotely applicable, the preemption question boils down to conflict preemption. The appellees did not and cannot prove conflict preemption.

1. Conflict preemption has a high threshold.

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. This is a 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.

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[7] Ironically, the district court's finding of field preemption conflicts with *Independent Living Ctr.*, the case the district court purported to follow. *Independent Living Ctr.* stated that "conflict preemption is the only type of preemption at issue in this case." 973 F. Supp. 2d at 1157.

582, 607, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011) (*Whiting*) (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). "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, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (emphasis added) (Kennedy, J., concurring in part and concurring in judgment) (citations omitted); *English v. General Elec. Co.*, 496 U.S 72, 90, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) (conflict must be actual, not hypothetical or speculative); *accord*, *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007).

Courts must apply conflict preemption cautiously because they violate the constitution if they impose their own policy conceptions in the course of finding implied preemption. *See, e.g.*, *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 Corp., Inc.*, 529 U.S. 861, 911, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (Stevens, J., dissenting) ("'[P]reemption 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, 131 S. Ct. 1131, 179 L. Ed. 2d 75 (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'").

Unless the conflict between state and federal law is clear, irreconcilable and irrefutable, thus making Congress's implied intent clear and manifest, the state claims should be allowed: The "presumption against preemption applies with equal force to conflict preemption." *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015).

2. There is no evidence that Congress intended for ADA Title II or Section 504 to preempt a municipality's third-party contract claims against the designers/builders of non-compliant public facilities.

Under any preemption analysis, Congressional intent is the "'ultimate touchstone.'" *Lohr*, 518 U.S. at 485; *accord*, *Puente Arizona*, 2016 WL 1730588 at *3. There is not a scintilla of evidence that Congress intended, in enacting the ADA or Section 504, to preempt municipalities from bringing third-party contract claims against contractors who promised to design and construct facilities in compliance with those statutes but breached their obligations, causing the municipality to pay damages and provide injunctive relief.

Congress certainly knew, when enacting the ADA and Section 504, that municipalities seeking to construct new facilities or refurbish existing ones in conformance with the accessibility requirements would need to retain expert contractors. *See, e.g.*, 28 C.F.R. § 35, App. B, p. 677 (2015) ("All governmental

activities of public entities are covered, even if they are carried out by contractors"). Yet the statutory language and legislative history of the ADA and Section 504 are devoid of any discussion or other indication that Congress intended to preclude municipalities from bringing third-party contract claims against contractors. *See* Charles Daugherty, *Who Needs Contract Law?*, 44 Ind. L. Rev. at 567 ("Congress simply did not mention indemnification in the [ADA's] legislative history").

The appellees' preemption argument thus rests on congressional silence—the suggestion that since Congress never specifically stated in the statute or legislative history that such third-party claims *are* permissible, courts should *infer* a contrary intent. *Independent Living Ctr.* espoused that view, by concluding that since Congress did not confer a federal right of action for indemnification and contribution in the ADA or Section 504 then allowing state-law contract claims would be "'nothing more than an unsupportable end run around the unavailability of indemnification and contribution under these civil rights statutes."' 973 F. Supp. 2d at 1161.

But that view flips preemption law on its head. It replaces the presumption against preemption with a presumption of preemption. Under appellees' upside-down view, if Congress fails to address an issue expressly or to confer a federal right of action or remedy, then it must be assumed that Congress impliedly intended to preempt any state law claims on that topic, even contract remedies.

The exact opposite is true. "[T]the Supreme Court has instructed that 'matters left unaddressed in [a comprehensive and detailed statutory scheme] are presumably left to the disposition provided by state law.'" *Mason and Dixon Intermodal, Inc v. Lapmaster Int'l LLC*, 632 F.3d 1056, 1061 (9th Cir. 2011) (quoting *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994)). Supreme Court "'pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as pre-empting state law.'" *Wyeth*, 555 U.S. at 603 (Thomas, J., concurring in the judgment) (citation omitted).

Independent Learning Ctr. got the preemption standard entirely backwards by concluding that the absence of a federal indemnification or contribution right under the ADA means Congress intended to limit similar state law remedies: "The presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists." *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988) (citing *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 251, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984)). "'The case for federal pre-emption is particularly weak where [, as here,] Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" *Wyeth*, 555 U.S. at 575 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc*., 489 U.S. 141, 166–67, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)).

If Congress considered a municipality's third-party contract claims against a contractor to be a threat to the ADA, it presumably would have expressly said so at some point, either statutorily or in the legislative history. *See, e.g.*, *Wyeth*, 555 U.S. at 574 ("[i]f Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point"). "The lack of specific anti-indemnification language indicates that Congress did not intend to change existing contractual relationships." Charles Daugherty, *Who Needs Contract Law?*, 44 Ind. L. Rev. at 565-66. Congress's silence compels the rejection of appellees' preemption defense.

3. The City's contract claims further, not irreconcilably conflict with, the purposes and objectives of the ADA and Section 504.

For the irreconcilable conflict required for conflict preemption to exist, either it must be physically impossible to comply with both the state and federal law or the state law must irreconcilably interfere with the purposes and objectives of the federal statute. *Gade*, 505 U.S. at 103; *Wyeth*, 555 U.S. at 563-64; §II.D.1, *ante*. There is no such conflict here.

The ADA and Section 504 were enacted to prevent discrimination against the disabled and to ensure public facilities are accessible to the disabled. To achieve that goal, private and public entities are liable for injunctive relief and damages for statutory violations. Far from irreconcilably conflicting with that

statutory scheme, the City's third-party claims against the contractors who actually performed the compliance work *furthers* that purpose.

The City does not claim that the contractual breaches by AECOM and Tutor provide the City a defense to plaintiffs' claims or that the City contracted away its ADA and Section 504 responsibility for the Van Nuys Flyaway facility. The City acknowledges that it is ultimately responsible for any failure of its public facilities to comply with the ADA and Section 504, in terms of both injunctive relief and damages. That is why the City resolved the plaintiffs' claims and agreed to rectify the issues regarding the Van Nuys facility.

Letting the City pursue its third-party contract claims against AECOM and Tutor does not eliminate or change the City's responsibility under those federal statutes or decrease the City's incentive to ensure compliance with them. The City always remains liable for non-compliance, including all the attendant risks and costs associated with ADA/Section 504 litigation. Letting the City pursue third-party claims against the expert contractors who were retained to, and promised to, ensure ADA/Section 504 compliance simply assures that *those contractors* have full incentive to ensure compliance by constructing the facilities correctly *in the first place*.

Independent Living Ctr., nonetheless, concluded that a municipality's contract claims for indemnification against contractors would undermine the ADA's policy that public entities be responsible for public facilities and might

make municipalities less vigorous in proactively addressing discrimination. *Independent Living Ctr.*, 973 F. Supp. 2d at 1160. That supposition defies reality.

A municipality is always responsible in the first instance if any of its facilities violate the ADA or Section 504. That means there is always a deep pocket defendant against whom a plaintiff can recover. More importantly, it means there is always a financially-viable entity subject to injunctive relief to correct the deficient facilities. No municipality, not even one with a potential indemnity claim against a contractor, would willingly subject itself to ADA/Section 504 liability given the inconvenience, costs and vagaries of litigation and injunctive relief—issues that can never be fully compensated by an indemnity award even if obtained down the road.

On the other hand, barring municipalities from pursuing third-party contract claims against the contractors who designed and constructed non-compliant facilities would harm the purposes and objectives of the ADA and Section 540. Barring such third-party claims turns public policy on its head by decreasing the incentive to ensure ADA/Section 504 compliance of the very entities that are best positioned to ensure such compliance—the expert contractors specifically retained to design and construct compliant public facilities. "Allowing contractual indemnification creates an incentive within the construction relationship for parties with the greatest expertise and control to ensure compliance." Charles Daugherty, *Who Needs Contract Law?*, 44 Ind. L. Rev. at 572. As is true for municipalities in general, the City may be in the public transportation business but it is *not* in the

business of *constructing* buildings. In seeking to comply with the ADA/Section 504, the City had no choice but to retain expert contractors to design and construct the Van Nuys FlyAway facility.

Barring the City from suing those contractors for the result of their own contractual breaches increases the risk of public facilities violating the ADA/Section 504's accessibility mandates:

> Improved accessibility is best achieved by providing the proper incentive structure. The proper incentive structure combines increased overall enforcement of design and construct mandates with internal risk allocation through contractual indemnification. . . . Through contractual indemnification, construction project participants can place ultimate financial responsibility on parties in the best position to avoid costs. . . . By allowing parties to contractually allocate risk and responsibility through indemnification and simultaneously ratcheting up enforcement, persons with disabilities will benefit, society will benefit, and the purposes of the . . . ADA will be better served.

Charles Daugherty, *Who Needs Contract Law?*, 44 Ind. L. Rev. at 578-79.

The best way to encourage municipalities to proactively ensure ADA/Section 504 compliance in public facilities is to afford them the confidence in securing the necessary contractors that they will be able to hold those contractors liable for breaching their contractual obligations to design/construct compliant facilities. If municipalities cannot pursue breach of contract and express indemnity claims against those contractors, the end result will be precisely what occurred in this case—prolonged litigation to bring facilities into compliance that the contractors *should have built correctly in the first place*. To ensure the public

facilities are correctly constructed in the first place, and to encourage public entities to be proactive in addressing disability discrimination, it is essential that contractors retained by municipalities to design and construct ADA/Section 504-compliant facilities face full exposure for their breaches.

Decreasing contractors' liability exposure by barring contract claims regarding their non-compliance does the exact opposite. It decreases contractors' incentive to ensure ADA/Section 504 compliance, thereby increasing the risk of deficient facilities being built and directly undermining the ADA's goal of assuring the greatest access and integration for all disabled persons. Letting municipalities sue contractors for breaching their contractual obligations to design and construct ADA-compliant facilities best assures the broadest ADA compliance, as it ensures that all entities and individuals in a position to prevent ADA violations can be held accountable for their non-compliance.

Precluding municipalities from suing contractors for breaching contractual duties to design and construct ADA/Section 504-compliant facilities would not just decrease the contractors' exposure to liability for their own ADA/Section 504 violations. In most instances, it would *immunize* the contractors against liability. That is because most ADA Title II plaintiffs only sue the deep pocket municipality, rather than unnecessarily complicating their lawsuit and increasing their litigation costs by suing contractors whose participation is unnecessary to plaintiffs' obtaining damages and injunctive relief.

This lawsuit represents the norm: The plaintiffs sued the City over ADA and Section 504 violations at the Van Nuys FlyAway station, but did not sue AECOM or Tutor. The City has fully resolved the plaintiffs' claims. Precluding the City from suing AECOM and Tutor for their contractual breaches in failing to design and construct an ADA/Section 504-compliant facility immunizes them from liability for their statutory violations and contractual breaches.

In allowing disabled plaintiffs to sue both public and private entities under the ADA, Congress clearly indicated that it wanted *all* ADA violators to be accountable for their wrongdoing. Had plaintiffs sued AECOM and Tutor, public policy and the City's interests would have been protected because the ADA liability could have been apportioned among the defendants according to their personal level of wrongdoing. There is no legitimate basis to conclude that Congress would have wanted AECOM, Tutor or any other ADA violator to escape scot free simply because the plaintiffs chose to sue only the deep-pocket municipality. Letting the municipality pursue third-party claims for breach of contract and express indemnity merely ensures that all ADA violators are brought into the lawsuit so they can be held accountable for their wrongdoing—a result that directly supports, not undermines, the ADA's purpose.

Upholding the district court's preemption ruling would also let AECOM and Tutor nullify, *ex post facto*, contract provisions that they expressly agreed to—provisions that presumably impacted the City's decision to accept their bid prices and affected decisions regarding insurance coverage. There is absolutely no basis

to conclude that Congress intended such interference with garden-variety contractual relationships and contract terms.

Far from the City's third-party claims irreconcilably conflicting with the "full purposes and objectives" of the ADA and Section 504, *Wyeth*, 555 U.S. at 563-64, the City's claims do the exact opposite: They *further* those goals. There is no conflict preemption.

4. ADA regulations and agency commentary demonstrate that Congress intended to allow, not invalidate, third-party contract claims against ADA violators.

ADA regulations enacted to effectuate congressional intent, and accompanying agency commentary, further refute appellees' preemption argument. Courts "ordinarily defer to an administering agency's reasonable interpretation of a statute." *Meyer v. Holley*, 537 U.S. 280, 287, 123 S. Ct. 824, 154 L. Ed. 2d 753 (2003). ADA regulations and accompanying agency commentary belie any suggestion that Congress intended to displace ordinary contractual allocations of responsibility or bar third-party claims for indemnification or contribution.

ADA regulations recognize that in contexts where multiple entities/individuals own or control property subject to the ADA's accessibility requirements, the parties can allocate ADA responsibility between themselves by contract. For example:

- Where multiple entities own or control a rail station, ADA Title II regulations set default allocations of legal and financial responsibility for accessibility modifications but permit the parties to contractually agree to different allocations. *See* 49 C.F.R. § 37.49(e) (2015). Such contracts are "strongly encourage[d]." 49 C.F.R. § 37, App. D, p. 453 (2015).

- ADA Title III regulations that prohibit discrimination by private entities who own or lease places of public accommodation provide a default allocation that the landlord and tenant are both responsible but allow those parties to allocate differently by contract. 28 C.F.R. § 36.201(b) (2015). The accompanying agency interpretations explain that "[t]he ADA was not intended to change existing landlord/tenant responsibilities as set forth in the lease" and that, as between the parties, compliance responsibility can be, and usually will be, determined by contract. 28 C.F.R. § 36, App. B, p. 905 (2015). "[T]he parties are free to allocate responsibilities in any way they choose." *Id.*, p. 906.

Although these regulations and comments do not address a municipality's contracts with contractors, they demonstrate that the ADA was not intended to bar the enforcement of all contract terms between parties that potentially limit or allocate ADA liability. They likewise indicate that the ADA was not intended to invade basic contract terms. Thus, the mere existence of these regulations undermines appellees' preemption theory.

Moreover, the question here is not whether disabled plaintiffs can hold the City liable for damages and injunctive relief. They can. The City acknowledges

that it has, as owner/operator of the Van Nuys FlyAway facility, the ultimate responsibility to ensure the facility is ADA/Section 504 compliant. The question, rather, is whether the City can pursue third-party contract claims against the contractors who agreed to design and construct ADA/Section 504-compliant facilities. Here too, ADA administrative comments refute appellees' preemption claim by confirming the viability of third-party claims. For example, they explain that:

- An employer who contracts with a hotel to host an employee conference can include a provision that the hotel will provide conference and hotel rooms accessible to disabled employees. 29 C.F.R. § 1630, App., p. 403 (2015). "If the hotel breaches this accessibility provision, the hotel may be liable to the employer, under a non-ADA breach of contract theory," even though the employer remains liable to the employees for the ADA non-compliance and even though disabled employees could sue the hotel independently for ADA violations. *Id*.

- An owner or person in control of a rail station, where responsibility for ADA compliance has been allocated contractually to someone else, must still reasonably cooperate with the responsible person. *See* 49 C.F.R. § 37.57 (2015); 49 C.F.R. § 37, App. D, pp. 453, 455 (2015). If noncooperation triggers an ADA violation, the responsible person remains liable to the plaintiff for discrimination "but the responsible person would have a third party action against the uncooperative owner or person in control." 49 C.F.R. § 37, App. D, p. 455. In other words, "[t]he responsible person could not use the lack of cooperation as a

defense in the lawsuit, but the uncooperative party *could be made to indemnify the responsible person for damages awarded the plaintiff*." *Id.* (emphasis added).

The above ADA regulations and commentary gut appellees' preemption argument. Under appellees' view of the ADA, there can be no such contractual allocations of responsibility and no such third-party claims.

Consequently, none of the possible indicia of congressional intent—statutory language, legislative history, agency regulations or agency commentary—support appellees' preemption argument. Not only is the requisite "clear and manifest" showing that Congress intended to preempt the City's claims utterly lacking, there is no such evidence whatsoever. Appellees' preemption defense fails as a matter of law.

5. The Fourth Circuit's *Equal Rights Ctr.* is distinguishable.

Most of *Independent Living Ctr.* addresses issues that are irrelevant to this appeal, such as whether implied rights to indemnity or contribution exist under federal law or whether federal law preempts non-contractual claims. *See* 973 F. Supp. 2d at 1149-60. On the issue that matters here, whether the ADA preempts a municipality's contract claims, the district court provided virtually no analysis other than quoting language from the lower court decision reviewed in the Fourth Circuit's *Equal Rights Ctr.*, 602 F.3d 597, indicating contractual indemnification might undermine the ADA. *See* 973 F. Supp. 2d at 1160-61.

Equal Rights Ctr. is the only federal circuit decision to date that has addressed ADA preemption. But the case is factually and legally distinguishable.

a. *Equal Rights Ctr.* is not an ADA Title II case.

Unlike here, the claims in *Equal Rights Ctr*. did not involve a municipality or any other public entity. There was no claim under ADA Title II or Section 504. The plaintiffs, rather, sued a private developer/owner of private housing projects for failing to provide apartments that would be accessible to people with disabilities. 602 F.3d at 598-99. As is typical for ADA cases that solely involve private parties, the plaintiff sued everyone under the sun—the developer/owner, the architect and various contractors. *Id.* The private developer then sued the architect for, *inter alia*, express indemnity and breach of contract. *Id*.

The Fourth Circuit found conflict preemption, emphasizing that the developer's indemnification claim "sought to allocate the full risk of loss" for the apartment building—"100% of the losses"—to the architect. *Equal Rights Ctr.*, 602 F.3d at 602. The Fourth Circuit concluded that "[i]f a developer of apartment housing, who concededly has a non-delegable duty to comply with the ADA and the [Fair Housing Act, 42 U.S.C., §§ 3601 *et seq*.], can be indemnified under state law for its ADA and FHA violations, then the developer will not be accountable for discriminatory practices in building apartment housing." *Id.* The court concluded "[s]uch a result is antithetical to the purposes of the FHA and ADA," so the claims are preempted. *Id*.

With respect to the developer seeking contribution from the architect (i.e., requiring the architect to contribute according to its proportionate share of wrongdoing), the Fourth Circuit ruled that the trial court did not abuse its discretion in denying the developer's belated, post-discovery prejudicial request to add a contribution claim. *Id.* at 603-04. Thus, the Fourth Circuit did *not* hold that a claim by the developer/owner requiring the architect to pay an amount proportionate to its actual wrongdoing would conflict with the ADA or Fair Housing Act. *Id*.

b. *Equal Rights Ctr.*'s legal discussion is suspect.

In relying on *Equal Rights Ctr.*, the district court here overlooked monumental distinctions between the circumstances of that non-ADA Title II case and a proper preemption analysis for an ADA Title II case. As an initial matter, *Equal Rights Ctr.*'s analysis is somewhat suspect, given its reliance on statements that conflict preemption exists where state law is an "obstacle" to Congress's purpose and that this "'requires the court independently to consider national interests and their putative conflict with state interests,'" which is "'more an exercise of policy choices by a court than strict statutory construction.'" 602 F.3d at 601.

Such language, if construed broadly, would run afoul of the Supreme Court's mandate that conflict preemption does not permit a freewheeling judicial inquiry allowing courts to impose their own policy suppositions, rather than courts simply trying to discern Congress's actual intent under the light of the presumption

against preemption. *See* § II.D.1, *ante*; *Fishback v. HSBC Retail Servs. Inc.*, No. CIV 12-0533 JB, 2013 WL 3227458, *12-13 (D.N.M. June 21, 2013) (detailing Supreme Court precedent, and noting the Court has "begun to back away" from broad "obstacle" preemption and "put renewed emphasis on the presumption against preemption"). *Equal Rights Ctr.* did not even mention the presumption against preemption. Nor did it discuss or analyze any legislative history or ADA Title II regulations.

c. *Equal Rights Ctr.*'s policy analysis supports a finding of "no preemption" here.

In any event, the Fourth Circuit's policy analysis, when applied to the City's third-party claims against AECOM and Tutor, leads to a finding of *no* preemption. The concern in *Equal Rights Ctr.* was that allowing the private developer/owner of the apartment buildings—who actually built the apartments and profited from their sale and rental—to shift *full liability for its own wrongdoing* to the architect would undermine the ADA's objectives, because the builder would not be accountable for its own violations. The Court, thus, concluded that immunizing the developer/builder from liability for its own wrongdoing would be antithetical to the ADA's purpose.

Here, in contrast, the district court's finding of preemption does exactly what *Equal Rights Ctr.* says should not happen: It effectively gives immunity to the entities who actually designed and built the Van Nuys FlyAway bus facility and who were the only entities in a realistic position to ensure ADA compliance. As is

par for the course in ADA Title II cases, the plaintiffs only sued the deep-pocket municipality.

Nor is the City, unlike the private developer in *Equal Rights Ctr.*, seeking to shift all loss attributable to its own conduct or omissions to AECOM and Tutor. The City's contract claims against AECOM and Tutor do not seek to hold those contractors accountable for *the City's* own acts or omissions. The claims, rather, seek to hold AECOM and Tutor accountable solely for *their own* actions—for AECOM and Tutor breaching their contractual duties to design and construct facilities that complied with the ADA and Section 504. That is true not just for the City's breach-of-contract claim but also for its express-indemnity claim. In contrast to *Equal Rights Ctr.*, where the indemnity claim sought to shift *all* liability for the developer's *own* conduct to the architect, the City's indemnity provisions only sought (a) to hold AECOM liable *for AECOM's* "negligent and/or intentional wrongful acts or omissions" (ER:24-25), and (b) to hold Tutor liable *for Tutor's* "acts and omissions," including any damages resulting *from Tutor's* noncompliance with the ADA (ER:25-26).

The City is not in the construction business, nor is it a for-profit organization. Saddling a municipality with sole financial liability when a public facility is not built and designed in compliance with the ADA means the builder and architects who are the only entities who can realistically ensure ADA compliance can avoid accountability for their own violations. It reduces their incentive to perform quality work that meets the statutory requirements. A

municipality's citizens are the ones who ultimately lose in this scenario. There would be an increased risk of contractors failing to build ADA-compliant facilities in the first place. And forcing the municipality to pay damages and provide injunctive relief without recourse against the contractors who actually failed to properly construct the facilities means the City will have less financial resources available for other public services.

Nothing in *Equal Rights Ctr.* even hints that the Fourth Circuit would find preemption in this Title II case or that this Court should too. The Fourth Circuit's policy analysis indicates the exact opposite: No preemption.

d. Fourth Circuit contribution law supports a finding of "no preemption" here.

The Fourth Circuit's treatment of contribution claims is also instructive. Although *Equal Rights Ctr.* never reached the issue of whether the ADA preempted the developer's contribution claims, the Court based it indemnification ruling on another Fourth Circuit case, *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989), and that case found contribution claims were *not* preempted. *See Equal Rights Ctr.*, 602 F.3d at 601-02.

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 confer immunity on wrongdoers. *Id.*; *see also 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.").

In the instant case, the district court concluded that any claim by the City based upon ADA-compliance was either an indemnity claim or a *de facto* indemnity claim. (ER:9-10, 20.) But, in reality, the City's claims were at most *de facto* claims for *contribution*. The City has never sought to shift to AECOM or Tutor liability for the City's own acts or omissions. It only seeks to hold them accountable for *their own* wrongdoing—for the damages attributable to their breaches of their contractual duties to design and build the Van Nuys FlyAway facility in compliance with the ADA.[8]

[8] The City did the only thing it realistically could do to meet its obligation to ensure the Van Nuys FlyAway station would comply with the ADA and Section 504: It retained expert contractors to design and build a compliant facility. No one has claimed that the City itself was negligent or that it individually engaged in wrongful acts or omissions vis-a-vis that station. The circumstances thus differ from the Fair Housing context at issue in *Independent Living Ctr*. There, the plaintiffs accused a city of knowingly allocating funding to developers to finance housing without conducting any oversight or monitoring to ensure the city program and funded housing would meet the ADA's accessibility requirements. *See* 973 F. Supp. 2d at 1144-45.

Properly construed, the policy analysis of *Equal Rights Co.*, and the Fourth Circuit precedent it relied on, support a finding that the City's claims here are not preempted. They certainly do not demonstrate the requisite clear and manifest showing that Congress intended preemption.

CONCLUSION

The district court's preemption ruling rests on faulty conclusions that the presumption against preemption does not apply to the ADA and that the ADA establishes field preemption. Under a proper application of preemption law, the City's contract claims against AECOM and Tutor are not preempted. Not only is the presumption against preemption alive and well in this context, but a finding of preemption would undermine, not further, the goal of ensuring public facilities are properly designed and constructed in compliance with the ADA and Section 504.

The judgment dismissing the City's third-party claims against appellees AECOM and Tutor based upon federal preemption must be reversed.

Dated: May 12, 2016

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CERTIFICATE OF COMPLIANCE

Circuit Rule 32-1

1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 28.1(e)(2)(c) and Ninth Circuit Rule 32-1. Excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), it contains **13,399 words**, as automatically calculated by the Word, version 2010, word processing program.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Word, version 2010, Times Roman, 14 point font.

DATE: May 12, 2016

/s/ Edward L. Xanders
Edward L. Xanders

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, third-party-plaintiff and appellant City of Los Angeles is aware of no other pending related case.

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2016, I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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