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 REPLY BRIEF

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INTRODUCTION

The appellees' briefs exemplify the adage, "If you ask the wrong question, you'll get the wrong answer." Appellees emphasize the wrong questions.

They extensively argue that there is no basis to imply a right to indemnification or contribution into the Americans with Disability Act (ADA) or section 504 of Rehabilitation Act of 1973 (RHA section 504). But this appeal is not about adding remedies to any federal statute. The question is whether Congress intended to preempt municipalities sued under Title II from bringing contractual indemnity claims specifically authorized by state law. The answer to that question: "No."

The appellees similarly focus on the wrong question by arguing that *owners* of facilities who violate the ADA cannot use indemnification claims to shift *all their liability* to others. Again, that's not the issue here.

First, this is a Title II case involving the construction of public facilities, a context where municipalities—unlike private developers of property—necessarily must rely on third-party designers and builders for ADA expertise and where ADA plaintiffs typically sue only the deep-pocket municipality. The public-policy ramifications differ greatly from contexts where private developers and architects sue each other.

Second, the City's contractual indemnity claims do not insulate the City from its own wrongdoing. The City's "hold harmless" provisions, which track *codified California public policy regarding public-agency construction contracts*,

except the City's own negligence and intentional wrongdoing and only hold the designer and builder of the Van Nuys FlyAway facility liable for *their own* misconduct. They are *de facto* contribution claims, not the sort of general indemnity claims at issue in the cases appellees cite. California has specifically mandated as a matter of state public policy what types of indemnity provisions are acceptable in public-agency construction contracts. The City's limited provisions comport with and further that state policy. There is not a speck of evidence that Congress intended to interfere with the California Legislature's policy choices.

With respect to the only question that truly matters, the appellees studiously avoid an answer: How could these types of limited contract claims—which are actually *de facto* contribution claims, which further codified California public policy, and which *ensure that no ADA violator escapes accountability*—irreconcilably conflict with the ADA or RHA section 504? The answer: They do not. Because there is no clear and manifest *irreconcilable* conflict, the presumption against preemption controls.

ARGUMENT

A. Contrary To Appellees' Sweeping "Indemnification" References, The City's Contractual Indemnity Claims Only Seek To Hold The Builder And Designer Of The Van Nuys FlyAway Facility Accountable For *Their Own* Wrongdoing, Consistent With Codified California Public Policy.

The appellees' briefs overflow with assertions about the ADA not conferring a right to "indemnification" or "indemnity." *See* Response Brief of Appellee Tutor Perini Corporation ("Tutor Br.") 2, 10-13, 16-22, 25-38; AECOM Services Inc.'s Appellee's Answering Brief ("AECOM Br.") 2-4, 10-15, 34-39. The briefs teem with references to parties not being able "to contract around ADA compliance" or use indemnification to "shirk" or "shift" duties, "offset their own liability," or obtain indemnity for "any loss it might incur." *E.g.*, Tutor Br. 2-3, 13-14, 33, 40-43, 48, 51; AECOM Br. 8-12, 14-15, 28, 34-36.

These overbroad assertions obfuscate the actual preemption issue before this Court. Through its contractual indemnity claims, the City merely seeks to hold the designer and builder of the Van Nuy FlyAway facility accountable for *their own negligence and/or intentional misconduct* in accordance with California state law and state public policy. The question is whether Congress intended to preempt these *specific, limited* indemnity claims, thereby nullifying *codified* California public policy.

1. Where, as here, a party seeks contractual indemnity, the contract terms define the claim's scope.

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 express indemnification contract exists, resort to implied indemnity principles improper). Contrary to appellees' hyperbole about the City trying to shift all liability to others, the City's contract claims do no such thing.

2. In accordance with codified California public policy, the "hold harmless" provision in the architect's contract applies only to the architect's negligent and/or intentional misconduct.

The "hold harmless" provision in the City's contract with appellee AECOM's predecessor—the consultant the City retained *to design* the Van Nuys FlyAway facility—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, it is expressly limited to personal injury or property damage resulting "from the *negligent and/or the intentional wrongful* acts or omissions *of Consultant*" or its employees, subcontractors or agents. ER:24-25 (emphasis added).

This limitation tracks *codified* California public policy. Because indemnity provisions in construction contracts impact public policy, the California Legislature has statutorily defined which indemnity provisions in construction contracts contravene California public policy and which do not. *See* Cal. Civ. Code § 2782 et seq. This includes contracts *with public agencies*. *See id.*

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). The statute includes *all* design professionals, including architects, engineers and surveyors. Cal. Civ. Code § 2782.8(c)(2).

Thus, the California Legislature has effectively recognized that the limited "hold harmless" provision in the City's contract with AECOM's predecessor—which is limited to that consultant's negligent or intentionally wrongful acts or omissions—comports with and furthers California public policy.

3. In accordance with codified California public policy, the "hold harmless" provision in the builder's contract excepts the City's sole negligence or willful misconduct.

The "hold harmless" provision in the City's contract with appellee Tutor's predecessor—the contractor the City retained *to construct* the Van Nuys FlyAway facility—is similarly limited. It expressly *excepts* the contractor from any liability regarding "the City's sole negligence or willful misconduct." ER:25. And the "compliance with laws" provision states that the contractor is liable only for damages resulting from the "*Contractor's* noncompliance." ER:26 (emphasis added).

These provisions likewise track codified California public policy. 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, while the City cannot seek indemnity for its own active negligence, it can—pursuant to its contract and California public policy—require the builder to indemnify the City *for the builder's own misconduct*. The California Legislature's

balance of barring municipalities from seeking indemnity for their own active misconduct while holding designers and builders liable for their own misconduct reflects the sound public policy that wrongdoers in construction projects can and should be held accountable through indemnity provisions. *See, e.g.*, West's Annotated Codes, Historical and Statutory notes to Cal. Civ. Code § 2782 (2012), Notes regarding Section 1 of Stats.2011, ch. 707 (S.B. 474) ("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).

4. The City's contract claims merely seek to hold the designer and builder liable for their own misconduct.

The City's third-party complaint comports with the contracts' limited scope. The count for "express contractual indemnity" only seeks to have the City held harmless from any damages or losses "incurred or to be incurred as a result of [the Flyaway station contractors'] *negligent or wrongful acts* in connection with the performance of their contracts with the City." ER:29-30 (emphasis added). It does not ask anyone to hold the City harmless for the City's active negligence or intentional wrongdoing.

5. The resulting preemption issue.

Given the actual language of the City's contracts with the designer and builder of the Van Nuys station, and the circumscribed nature of the City's contractual indemnity claim, the appellees' sweeping assertions about

"indemnification" and "indemnity" are misleading and, ultimately, irrelevant. So are the cases appellees cite that involve broader contract provisions that would be void under California law. *See, e.g.*, *Rolf Jensen & Assocs., Inc. v. District Court*, 282 P.3d 743, 745 (Nev. 2012) (*Rolf Jensen*) (contract provision required design consultant to indemnify private development corporation for *any* damages arising from the consultant's acts or omissions); *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 599, 602 (4th Cir. 2010) (*Equal Rights Ctr.*) (contract provision required architect to indemnify private developer-owner for *all* damages arising out of or resulting from the architect's performance or non-performance—i.e., for "the full risk of loss").

The City's contractual indemnity claims do not seek to hold AECOM and Tutor liable for the City's own negligence. They seek, as authorized by California law and public policy, to hold them accountable (as successors in interest) for the negligence or intentional misconduct of the designer and builder of the Van Nuys station. Those entities agreed to the contract terms in arms' length transactions and those terms likely impacted bid prices and insurance decisions.

So, the question for this Court is not whether the ADA preempts a party from seeking broad indemnification for an entire risk of loss. Nor is it even about the rights of private owner-developers of property. It is whether, in enacting ADA Title II, Congress clearly intended to preempt a municipality's state-law contract claims for construction indemnity that, in accordance with negotiated provisions specifically authorized by codified state public policy, merely seek to hold the

designer and builder of a non-compliant ADA facility liable *for their own misconduct*, not the municipality's misconduct.

The City's claims do not shift "non-delegable duties." A public agency always remains liable for damages and injunctive relief under Title II for any non-ADA compliance. That's exactly why the City, after receiving the report of plaintiffs' expert detailing ADA violations at the Van Nuys FlyAway station, settled and agreed to rectify the issues. So the question becomes whether designers and builders—entities a municipality *has no choice* but to rely on to ensure ADA-compliant facilities are built—can escape scot-free *for their own wrongdoing* whenever the plaintiff, as typically happens in ADA Title II cases, chooses to sue only the deep-pocket municipality? The answer should be: "No."

B. Appellees Erroneously Conflate Preemption Standards With The Standard For Implying Remedies Into A Federal Statute.

Instead of focusing on preemption, the appellees devote most of their briefs to arguing that the circumstances do not meet the test for *implying* remedies of indemnification or contribution into the ADA or RHA section 504, that numerous case so hold, and that the City therefore has no right to indemnity or contribution under the ADA/RHA. Tutor Br. 1-4, 10-14, 33-44; AECOM Br. 2, 8-10, 15-22, 30, 36-38.

Tutor, for example, argues that the City "asks this Court to create a private right of indemnification" or "a new private right/remedy . . . that Congress intentionally omitted," that no precedent supports rewriting the ADA and Section

504 "to grant additional remedies to ADA violators" and that this Court should not "enlarge the remedial provisions of the ADA . . . ." Tutor Br. 1, 3-4, 10.

Similarly, AECOM re-writes the "issue presented" to be whether entities sued for ADA or RHA section 504 violations can "assert a claim for indemnity or contribution against third parties?"; it then extensively argues that neither federal statute "provides a basis for third party complaints for indemnity or contribution." AECOM Br. 2, 15 (capitalization normalized); *see id.* at 10 (neither statute "provide[s] for or contemplate[s] indemnity or contribution claims" and their comprehensive nature indicates the specified remedies "were intended to be the *sole* means of implementing its [sic] goals") (emphasis in original).

But the question for this Court is *not* whether some undefined "indemnification" or "contribution" right should be *implied* as a remedy into the ADA or RHA. It is whether Congress intended *to preempt* a municipality's *contract* claims for limited construction indemnity that are *specifically authorized by state statutes and that further codified state public policy*. That's a fundamentally different question. The Third Circuit effectively recognized the distinction in *Bowers v. NCAA*, 346 F.3d 402 (3d Cir. 2003). In the course of finding no basis to imply a right of contribution into ADA Title II, the Court stated that "we may assume that a defendant in a traditional common law breach of contract case *would be entitled to contribution* . . . ." *Id.* at 430 (emphasis added); *see Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1107-08 (4th Cir. 1989) (*Baker Watts*) (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, appellees flip preemption standards on their head. As the City's opening brief explained, congressional silence on preemption issues is a reason to find Congress did *not* intend preemption. *See* Appellant's Opening Brief (AOB) 38. Yet appellees tout such silence as a reason to *find* preemption, by emphasizing the holding of *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 101 S. Ct. 1557, 67 L. Ed. 2d 750 (1981) "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.'" Tutor Br. 35 (quoting *Northwest Airlines*, 451 U.S at 79-80) (emphasis added); *see* AECOM Br. 16-17, 21. But that is an implied-remedy standard, *not* a preemption standard.

The presumption in all contexts is that Congress will state its intentions *expressly* (either in a statute or legislative history) and that silence indicates Congress *did* not intend to do something. *See Northwest Airlines*, 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. 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 v. Levine*, 555 U.S 555, 603, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)

(Thomas, J., concurring in the judgment). While a statute's comprehensive nature may be a reason to refuse *to imply a remedy* (Tutor Br. 12; AECOM Br. 10), it also is a reason to refuse *to find preemption*. As this Circuit has recognized, "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)) (emphasis added).

C. This Case Is One Of First Impression.

Appellees contend that "[t]he issue presented in this appeal is neither new nor one of first impression" and that the City's arguments "have been repeatedly advanced and rejected" in numerous cases. AECOM Br. 8-9; *accord*, Tutor Br. 44 (claiming a "unanimity of legal precedent").

Not so. This case *is* one of first impression. Every case cited by appellees is distinguishable. Not one addresses the exact issue before this Court. Appellees erroneously treat any case mentioning "indemnification" as directly on point, regardless of context.

1. The only circuit-court ADA preemption case is distinguishable.

As the City's opening brief explained, only one federal circuit court has addressed ADA preemption, the Fourth Circuit in *Equal Rights Ctr.*, 602 F.3d 597. AOB 48-55. Appellees rely heavily on that case.

That case, however, did not involve ADA Title II or RHA section 540. Disability advocacy groups sued the private developer-owner of apartment buildings—an entity that, unlike a city, should be an expert in ADA construction standards and, unlike a city, is not forced to rely on private experts. 602 F.3d at 598-99; AOB 49. Nor was the Court addressing the same, limited contractual indemnity provision at issue here. Instead, the Court was assessing the developer's general indemnity claim against an architect that sought to "completely insulate" the developer from liability by allocating "the full risk of the loss"—"100% of the losses"—to the architect. 602 F.3d at 602. The Court concluded that "[i]f a developer of apartment housing . . . can be indemnified under state law *for its* ADA or FHA violations, then the developer will not be accountable for discriminatory practices in building apartment housing." *Id.* Here, in contrast, it is *the denial* of the City's contract claims that will result in the builder and architect of the Van Nuys Flyaway stations not being accountable for their ADA violations.[1]

2. The only ADA Title II preemption cases are distinguishable.

Among the myriad cases appellees cite, only two are ADA Title II preemption cases, *Independent Living Ctr. of Southern California v. City of Los Angeles*, 973 F. Supp. 2d 1139 (C.D. Cal. 2013) (*Independent Living Ctr.*) and *Chicago Housing Auth. v. DeSetafno and Partners, Ltd*, 45 N.E.3d 767 (Ill. App.

[1] The appellees double-count in their string cites by repeatedly citing *Equal Rights Ctr. v. Archstone Smith Trust*, 603 F. Supp. 2d 814 (D. Md. 2009). That is the district court decision the Fourth Circuit affirmed.

Ct. 2015) (*Chicago Housing*). Neither involved an indemnity claim analogous to the City's contract claim here.

Independent Living Ctr. is the case upon which the district court here relied. But there, unlike here, a municipality and a public agency were accused of operating an unlawful housing program, as opposed to being sued "'because a particular building violated [ADA] provisions.'" 973 F. Supp. 2d at 1148. The public entities were accused of failing to enact reasonable *policies* administering and overseeing "the expenditure of public funds in accessible housing throughout the City"—obligations that "could not have been taken by the individual private property owners." *Id.* at 1149. Yet the indemnity provisions in the contracts property owners had to execute to receive public housing funds provided that the government entities, to the extent they were held responsible for non-compliance with the ADA and RHA section 504, would be "entitled to contribution and indemnity[.]'" *Id.* at 1160. Here, in contrast, the City's construction contracts with AECOM and Tutor's predecessors preclude the City from obtaining reimbursement for the City's own active negligence.

The other ADA Title II preemption case, *Chicago Housing*, 45 N.E.3d 767, likewise did not involve a contract claim analogous to the City's here; rather, it involved an indemnity claim that would violate California law. A Chicago housing agency updating public housing sought to recover the costs of a rehabilitation project from an architectural/engineering firm based solely upon that firm's agreement to certify that all work conformed to the ADA. 45 N.E.3d at 769. The

court concluded that the breach of contract claim was "a *de facto* indemnity claim similar to that in *Equal Rights Center*," and that allowing the public agency "to seek indemnification from defendant effectively would insulate it from liability," contrary to the goals of preventing discrimination against the disabled. *Id.* at 774, 776. Again, the City's contract claim here does not—and cannot under California law—seek to shift the City's negligence to anyone else. It does not "insulate" the City from its own wrongdoing.

3. The other cited cases are distinguishable.

Appellees cite four non-Title II cases that are merely *Equal Rights Ctr.* clones and entirely dissimilar to the present case:

- In *Rolf Jensen*, 282 P.3d 743, 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 Ctr.*, 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. In stark contrast to the City's situation here, where the City has no choice but to rely on contractors and consultants, the Court 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).

- *United States v. Bryan Co.*, No. 3:11-CV-302-CWR-LRA, 2012 WL 2051861 (S.D. Miss. June 6, 2012) similarly involved contractors and developers of apartment complexes seeking indemnification for ADA violations from an architect. *Id.* at *1. The court followed *Equal Rights Ctr*., concluding that the developer-owners "cannot shift to their architect all of the liability they may have for building inaccessible housing" and that letting developers do so would leave them with "little incentive to self-test to discover potential violations during the planning and construction phases." *Id.* at *5. The Court emphasized (again contrary to the circumstances here) that this was an indemnification claim to shift *all* potential liability, as opposed to a contribution claim seeking recovery according to proportionate fault. *Id.* at *2.

- *United States v. Murphy Dev. LLC*, No. 3:08-0960, 2009 WL 3614829 (M.D. Tenn. Oct 27, 2009), involved the government's ADA Title III suit against the private owners and developers of apartment complexes, who cross-complained against architects, engineers and contractors. The court found there was no implied right of contribution or indemnification under the ADA or FHA, and then dismissed any state-law claims for express or implied indemnity and contribution based solely upon the district court decision in *Equal Rights Ctr.* *See id*. at *2. In doing so, the court failed to recognize that *Equal Rights Ctr*'s holding applied only

to state-law *de facto* claims for indemnification (a full shifting of all liability), *not contribution*. *See* 603 F. Supp. 2d at 825-26; 602 F.3d at 601-02; AOB 53-54.

- In *United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767 (E.D.N.C. 2003) (*Quality Built*), a construction company that built apartments that violated the Fair Housing Act sought indemnification from the project architect. The court held that to the extent the construction company's contract claims were "in fact *de facto* claims for indemnification"—because they sought to shift "the entire liability" to the architect— then the claims would be contrary to the purpose of the Fair Housing Act. *Id.* at 779. However, relying on *Baker Watts*, 876 F.2d 1101, the same case the City has emphasized (AOB 53-54), *Quality Built* held that *de facto contribution claims* against the architect were *not* preempted. *Id*. It held that the construction company hired the architect for its expertise and the architect "had an independent obligation to perform competently and fulfill the terms of its contract," and therefore the construction company could pursue "these distinct state law claims which may allow *for some form of contribution* from [the architect]." *Id.* (emphasis added).

That is the entirety of the preemption precedent cited by appellees. The other cases instead address whether *implied rights* to indemnification or contribution exist under the ADA or other federal statutes. *See*, *e.g.*, *Bowers v. NCAA*, 346 F.3d 402 (no implied right to contribution under ADA Title II or RHA section 504); *United States v. Gambone Bros. Dev. Co.*, No. 06-1386, 2008 WL 4410093, *5-9 (E.D. Pa. Sept. 25, 2008) (company that designed and constructed

apartment complexes that violated the Fair Housing Act had no implied right to contribution or indemnity from designer under the FHA); *Access 4 All, Inc. v. Trump Int'l Hotel and Tower Condominium*, No. 04-CV-7497KMK, 2007 WL 633951 (S.D.N.Y. Feb. 26, 2007) (developer had no implied right to indemnification against architect of all liability under the ADA or New York common law).

In sum, the appellees' assertions that numerous courts have considered and rejected the City's contentions amount to wishful thinking. *No court* has examined the exact issue that is before this Court. No case involved the type of limited indemnity claim at issue here (which is actually a *de facto* contribution claim), including the only two ADA Title II cases. Even cases the appellees cite recognize that there is no preemption where, as here, a party with a non-delegable duty merely seeks to have wrongdoers contribute according to their own fault. *See*, *e.g.*, *Quality Built*, 309 F. Supp. 2d at 779; *United States v. Bryan Co.*, 2012 WL 2051861 at *2. And the non-Title II cases all involve indemnity battles between the private entities that actually developed, constructed and designed facilities, not a municipality that has no choice but to rely on such entities to construct public facilities.

D. Appellees Cannot Avoid The Presumption Against Preemption.

As the City's opening brief explained, the presumption against preemption applies in *every* case and conflict preemption entails a high threshold. AOB 14-28, 34-36.

AECOM, nonetheless, faults the City for devoting "a considerable portion of its brief" to the presumption. AECOM Br. 22. AECOM ignores that the district court here specifically held that the presumption against preemption *does not apply to the ADA*. ER:19.

Instead of trying to defend the district court's erroneous conclusion, AECOM tries to sweep it under the carpet by claiming the presumption "yields to simple fact [sic] that state law indemnity and contribution claims" would undermine the ADA. AECOM Br. 23. Says who? The point of the presumption is that Congress can be expected to state its views expressly and make its intentions clear, and preemption is not supposed to be a basis for courts to impose their own freewheeling public-policy views. *See* AOB 34-36.

AECOM further confuses the issue by claiming "whether or not an indemnity or contribution claim can be taken from a federal ADA claim" does not affect state statutes because "the beneficiary of the right to indemnity" is the defendant and not the disabled plaintiff. AECOM Br. 24. Once again, the issue is not whether a right of indemnification or contribution can be implied into the ADA. It is whether in contexts where, as here, a state has its own codified public policy allowing public agencies entering into construction contracts to require certain limited indemnity/contribution rights, did Congress intend to preempt related state law contract claims. The general presumption is that Congress did *not* intend to interfere with state contract law or state public policy, particularly when discrimination or public health is at issue. AOB 17-23.

AECOM acknowledges that *Rolf Jensen* rejects AECOM's contention that the presumption against preemption does not apply to ADA indemnification issues. AECOM Br. 24. But AECOM asserts as a fallback argument that *Rolf Jensen* concluded that "any presumption against preemption is particularly attenuated *where anti-discrimination laws* are involved, given the primary role played by the federal government in that regard." *Id*. at 24 n.10 (emphasis added). AECOM's fallback reliance on *Rolf Jensen* is misplaced.

For starters, if that is what *Rolf Jensen* meant, the assertion conflicts with Ninth Circuit law. *See Kroske v. U.S. Bank Corp*., 432 F.3d 976, 981 (9th Cir. 2005) (presumption of preemption applies to laws prohibiting/remedying discrimination because they fall within "the State's historic police powers"). Yet *Rolf Jensen* cited *Kroske*, so what the Court seems to have concluded is that the presumption against preemption applies to the ADA but "does not apply with *particular force*" because "historically states have, at best, played a junior role" in the *area of disability discrimination*. 282 P.2d at 747 (emphasis added). But that conclusion is inaccurate. Prior to Congress enacting the RHA and ADA, Congress played *no* role in disability discrimination. The Supreme Court has recognized, in discussing laws requiring "special accommodations for the disabled," that "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.'" *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531

U.S. 356, 368 & n.9, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (emphasis added).[2] California had long legislated in the disability-discrimination field before Congress passed its first statute. AOB 21 & n.4. Regardless, Congress certainly knew, when enacting the ADA and RHA section 504, of the possibility that parties to construction contracts would bring contractual indemnity claims authorized by state law, yet Congress voiced no concern, not even in legislative history.

Tutor, on the other hand, employs a different tactic to try to circumvent the presumption against preemption. It acknowledges that courts start with the presumption that state police powers are not to be preempted "unless that was the clear and manifest purpose of Congress." Tutor Br. 16 (citations omitted). But it then contends the presumption is inapplicable "because Congress' intent for the ADA to redress the societal discrimination of disabled persons by state agencies and private parties in a comprehensive manner is *clear and manifest* in both the statutory text and legislative record." *Id.* at 27 (emphasis added). Tutor asserts that "[o]nce Congress' intent to occupy a legal field is manifest, the presumption analysis ends: no more presumption against preemption." *Id.*

[2] *Rolf Jenson* based its "junior role" comment solely on *Alexander v. Choate*, 469 U.S. 287, 295-96, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985), which it described as "explaining that Congress enacted provisions prohibiting discrimination against disabled persons precisely because such persons had otherwise been neglected." 282 P.3d at 747. But *Alexander v. Choate* did not say that states had not enacted anti-disability-discrimination laws. Rather, the legislators' comments about disabled persons being neglected addressed the absence of *federal* legislation and the need for RHA section 504. *See* 469 U.S. at 295-96.

It is irrefutable, however, that the ADA does *not* occupy the legal field of disability discrimination; the ADA even expressly states there is no field preemption. *See* AOB 30-34. And it is well-settled that the need for a comprehensive federal mandate does not, by itself, defeat the presumption against preemption because that need exists almost any time Congress chooses to enact federal legislation in an area where states have legislated. *See* AOB 26-27, 33.

If the ADA specified that a public facility must have a particular amount of handicap bathroom stalls but a state law required less, that would create the sort of irreconcilable conflict permitting the conclusion that Congress clearly intended preemption. But there's no such irreconcilable conflict here. The City's indemnity contract claims are not the sort of broad general indemnity claims cases have prohibited. They do not seek to hold others accountable for the City's active negligence; they only seek reimbursement for others' misconduct.

The appellees' policy arguments as to why they believe the City's contractual claims, which rest on codified state policy, undermine the ADA is the sort of "'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'" that the Supreme Court has declared "[i]mplied preemption analysis does not justify." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607, 131 S. Ct. 1968, 179 L Ed. 2d 1031 (2011). Letting courts find conflict preemption without a clear and manifest irreconcilable conflict "'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Id.* The appellees ignore the high conflict-preemption threshold that the Supreme

Court has set to prevent courts from imposing preemption based upon their own policy choices. *See* AOB 34-36.

There is absolutely no basis to conclude that Congress intended to preempt the City's limited contract claims, let alone any "clear and manifest" showing. The presumption against preemption, which "applies with equal force to conflict preemption," therefore controls. *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015).

E. Appellees Ignore The Import Of The ADA Regulations And Agency Commentary.

One of the problems with ADA indemnification precedent is that courts often parrot language from other cases without conducting their own independent analysis. For example, cases repeat as gospel the notion that landlord-tenant relationships are the only context where ADA regulations permit indemnification or liability allocation. *See*, *e.g.*, *Rolf Jensen*, 282 P.3d at 747; *Chicago Housing*, 45 N.E.3d at 773. AECOM repeats this mantra by stating (ignoring that there is no congressional enactment, only an agency regulation) that "Congress specified only *one* instance in which contractual allocation of risk for ADA violators is permissible (between lessors and lessees) . . . ." AECOM Br. 24 (emphasis in original).

But that mantra is wrong. As the City's opening brief explained: (a) Title II regulations allow entities that own or control rail stations to allocate liability, and (b) administrative comments acknowledge the right of parties with non-delegable

ADA duties to seek reimbursement or contribution through third-party contract claims against parties whose conduct triggered the ADA violation. AOB 45-48.

Tutor, unlike AECOM, recognizes the broader scope of the agency regulations and commentary but argues that "agency rules and commentary do not supersede a statute's explicit text and the legislative record." Tutor Br. 46. That may be true but the point is irrelevant where, as here, the ADA and its legislative record are *silent* on the issue.

Tutor also argues that these ADA regulations reinforce appellees' preemption argument because they do not specifically address liability allocations between owners and third-party contractors. Tutor Br. 47-48. Tutor misses the point. The appellees have argued that the failure of the ADA and its legislative history to expressly discuss indemnification or contribution shows Congress intended to *preclude* any such right. The agency regulations and comments refute that contention, by demonstrating the administrative view that contractual indemnification/contribution comports with Congress' intent. Tutor also overemphasizes the fact that neither regulation specifically authorizes contract claims against third-party contractors. The regulations solely address the allocation of ADA liability among property *owners*, so there would have been no reason to address owners' construction contracts with third parties.

Tutor also ignores the agency commentary explaining that if an employer contracted with a hotel to provide certain handicap-accessible facilities but the hotel breached, the employer would remain liable for the ADA non-compliance but

the hotel would be liable to the employer for breach of contract even though the disabled employees could sue the hotel independently. *See* AOB 47, discussing 29 C.F.R. § 1630, App., p. 403 (2015). This commentary defeats appellees' view of the ADA. Under the appellees' view, the employer's breach of contract claim would be an impermissible *de facto* indemnity claim that undermines the employer's non-delegable ADA duty and therefore the hotel could only face liability if sued directly by the disabled plaintiffs.

F. There Is No Irreconcilable Conflict For Conflict-Preemption Purposes.

1. The appellees, ignoring the limited scope of the City's contractual claims, misleadingly conflate *de facto* indemnification claims with *de facto* contribution claims.

In trying to manufacture an irreconcilable conflict between the ADA and the City's contract claims, appellees emphasize that the City's ADA responsibility is "non-delegable." Tutor Br. 1-3, 13-15, 39-40; AECOM Br. 9, 11, 26, 35.

But the non-delegable nature of the City's ADA responsibility merely means that the City, as it has consistently acknowledged, always remains liable to any ADA plaintiffs as matter of law for the full amount of all damages and injunctive relief. It does not mean that AECOM and Tutor are immune from third-party claims.

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—which is exactly what the City's contract claims seek to do. *See, e.g.*, *Walker v. Crigler*, 976 F.2d 900, 905 n.9 (4th Cir. 1992) ("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") (emphasis added); *Parsons v. The 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) (emphasis added); *Robinson v. Shapiro*, 646 F.2d 734, 739 (2d Cir. 1981) (noting that "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) (emphasis added); 18 C.J.S. *Contribution* § 20, Contractors, property owners and tenants (2016) ("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) (emphasis added).

The appellees consistently confuse the issue by stating there is no implied right to "indemnification or contribution" in the ADA or RHA, and then characterizing preemption cases as saying the same thing. *See, e.g.*, AECOM Br. 37 (claiming the "bar upon actions for indemnity and contribution applies to *any*

action" (emphasis in original), but then citing preemption cases that only addressed *de facto* indemnity claims, *not de facto contribution claims*). The preemption cases do not say that. They focus solely on *indemnification* (that is, general indemnity—the *full* shifting of, or insulation against, *all* liability), as opposed to contribution (reimbursement or contribution according to proportionate fault). *See* § C, *ante*;

As the City's opening brief explained, the City's contractual indemnity claims are really *de facto* contribution claims because those provisions do not allow the City to hold the builder and designer liable for the City's own negligence and they seek recovery based on their actual fault. *See also* § A, *ante*. That context fundamentally differs from the cases cited by the appellees, where courts applied preemption to claims seeking to shift *all* liability to other entities. *Id.*

As the City's opening brief also explained, the context here is analogous to the circumstances in *Baker Watts*, 876 F.2d 1101, the case that *Equal Rights Ctr*. followed as to indemnification (*Equal Rights Ctr.* never reached the contribution issue). *See* AOB 53-55. *Baker Watts* applied preemption to *indemnification* only—i.e., claims allowing a wrongdoer "to shift its entire responsibility for federal violations"—but it held *state-law contribution* claims were *not* preempted because they would further the federal statute's purpose "by holding all violators to account." 876 F. 2d at 1107-08; *see also Quality Built*, 309 F. Supp. 2d at 779 (holding company's indemnification claim against architect was preempted but the

company could pursue state law contract claims "which may allow *for some form of contribution* from [the architect]") (emphasis added).

The appellees' briefs do not even mention *Baker Watts* or *Quality Built*'s contribution holding. They simply resort to treating the City's contract claims as broad general indemnity claims, something they are not and that California law prohibits. The City's contract claims do not irreconcilably conflict with the ADA or RHA section 504. To the contrary, they further their statutory purpose by ensuring *all* violators can be held accountable.

2. Allowing a municipality's third-party claims would not impair an ADA plaintiff's lawsuit.

AECOM argues that permitting third-party complaints would interfere with a disabled plaintiff's decision to sue only the deep-pocket municipality, because the lawsuits would become more complex if the municipality brought in other alleged wrongdoers, who then pursued additional entities. AECOM Br. 31-34.

No case supports the notion that the potential complexity of a lawsuit is a basis for finding preemption. In any event, AECOM's argument is smoke and mirrors, as this case exemplifies.

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 detailing what is in non-compliance and what must be fixed. If the municipality disputes the report, the issue can be resolved at a bifurcated trial between only the plaintiff and the municipality. If the municipality accepts the report, the case settles as it did here, with the municipality agreeing to rectify the non-compliance. All that is left then, as is true here, are the municipality's claims to obtain reimbursement from alleged wrongdoers in accordance with their own fault.

CONCLUSION

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

Dated: August 26, 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. P. 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 **6962 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: August 26, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing **APPELLANT'S REPLY 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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