Case No. 15-56606

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF LOS ANGELES, a municipal corporation,
Third-party Plaintiff and Appellant,

vs.

AECOM SERVICES, INC. and
TUTOR PERINI CORPORATION,
Third-party Defendants and Appellees.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES IN SUPPORT OF THE CITY OF LOS ANGELES AND IN SUPPORT OF REVERSAL

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

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LEAGUE OF CALIFORNIA CITIES AND
CALIFORNIA ASSOCIATION OF JOINT
POWERS AUTHORITIES

The League of California Cities (League) and the California Association of Joint Powers Authorities respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the City of Los Angeles's request to reverse the district court's judgment dismissing its third-party claims against Aecom Services Inc. and Tutor-Perini Corporation. *Amici* sought the consent of the parties before filing this brief. The City of Los Angeles consented, Tutor-Perini Corporation refused consent, and Aecom Services did not respond as of the deadline for filing this motion and accompanying brief.

I. The Movants' Interest

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. It has identified this case as having such importance.

The California Association of Joint Powers Authorities (CAJPA) represents 99 joint powers authorities (JPAs) providing group self-insurance and risk management services to a vast majority of the public entities in California. CAJPA has a special interest in this case because its JPA members endorse the view that those with the ability to minimize liabilities should be held to pay for those liabilities, rather than using public funds to pay for liabilities that the contractor was already paid to alleviate.

II. Argument

This appeal arises from an action for alleged violation of Title II of the Americans with Disabilities Act brought by private plaintiffs in connection with a public facility, owned and operated by the City of Los Angeles, that was designed and constructed by the predecessors in interest to third-party defendants Aecom Services, Inc. and Tutor-Perini Corporation. The district court dismissed Los Angeles's third-party claims for contractual indemnification against the third-party defendants, reasoning that any contractual indemnity provisions conflicted with the public policy underlying the ADA of holding public entities liable for accessibility failures and thus were preempted by the ADA.

Amici bring an important perspective to this case because their members have extensive experience with public works contracting. Based on that experience, *amici* have concluded that the district court's decision, if upheld, will hamper the ability of public entities to comply with the ADA because it will reduce their contractors' incentives to design and construct compliant buildings. In effect, contractors will be insulated from third-party liability for failing to competently perform their contractual duties.

The district court's decision rested in part on its conclusion that public entities will lose incentives to comply with the ADA if they are indemnified by contractors for accessibility failures. This conclusion relies on an erroneous view of California's law of contractual indemnity. While the district court believed that contractual indemnity could insulate public entities even from their own active negligence in failing to comply with the ADA, that view is incorrect. Instead, under California law, a public entity's indemnity clause that purports to indemnify the entity for its own active fault is void. Thus, contrary to the district court's

view, a public entity cannot insulate itself from its own wrongdoing through indemnity clauses.

Amici's proposed brief addresses matters not addressed in the City of Los Angeles's brief, such as California's law of indemnity and the importance of indemnity clauses to public works contracting throughout the State, and reflects *amici*'s knowledge and experience with these issues. *Amici* therefore respectfully submit that this Court should permit the filing of the proposed brief.

Dated: May 19, 2016

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the League of California Cities and California Association of Joint Powers Authorities aver that they are nonprofit corporations which do not issue stock and which are not a subsidiary or affiliate of any publicly owned corporation.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The League of California Cities (League) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The California Association of Joint Powers Authorities (CAJPA) represents 99 joint powers authorities (JPAs) providing group self-insurance and risk management services to a vast majority of the public entities in California. CAJPA has a special interest in this case because its JPA members endorse the view that those with the ability to minimize liabilities should be held to pay for those liabilities, rather than using public funds to pay for liabilities that the contractor was already paid to alleviate.

The League and CAJPA have identified this case as having statewide significance in light of the importance of contractual indemnification provisions in public contracting. Because public entities in California frequently contract to construct or upgrade public works, they rely on indemnification provisions to enforce contractors' promises to construct facilities that comply with Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq.* The district court's decision, if upheld, will hamper the ability of public entities to comply with the ADA because it will reduce their contractors' incentives to design and construct compliant buildings, and it will deprive cities of important contractual remedies.

This brief is accompanied by a motion for leave of the Court to file an *amicus* brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

No party's counsel authored this brief in whole or in part. No outside person or entity contributed funding for the brief.

ARGUMENT

I. Express Contractual Rights of Indemnification Are Critical to Public Contracting and to Public Entities' Ability to Ensure ADA Compliance

Express indemnity under California law arises from contract, and its basis in principles of mutual assent "permit[s] great freedom of action to the parties in the establishment of the indemnity arrangements." *E.L. White, Inc. v. City of Huntington Beach*, 579 P.2d 505, 510-11 (Cal. 1978). Courts generally enforce express indemnity provisions as they are written, in keeping with established rules of contract construction. *Id.* But public entities are forbidden by the Legislature from contracting around responsibility for their own negligence. California Civil Code § 2782(b) voids any contractual clause "which purport[s] to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency."

Municipalities and other government entities typically contract for public works rather than employing workers to construct them. And they frequently rely on contractual indemnity provisions in a great variety of public works contract disputes. *See, e.g.*, *E.L. White*, 579 P.2d at 502 (worker injury connected to construction of storm drain and other public improvements); *MacDonald & Kruse, Inc. v. San Jose Steel Co.*, 105 Cal. Rptr. 725, 727 (Cal. Ct. App. 1972) (worker injured during construction of freeway); *Los Angeles County v. Cox Bros. Const. Co.*, 16 Cal. Rptr. 250, 250-51 (Cal. Ct. App. 1961) (driver injured because of construction of roadway improvements).

Because public entities rely on contractors to design and construct public works projects, they also assign contractual responsibility to contractors to ensure

that these projects are constructed in compliance with the ADA. This does not mean, of course, that public entities are not ultimately responsible for complying with Title II of the ADA. Of course they are. But public entities frequently use the services of knowledgeable and experienced contractors as their chosen method for discharging this responsibility. Express contractual provisions assigning contractors liability for their own failures to design and construct accessible buildings are necessary to this method.

The City and County of San Francisco's recent experience in rebuilding numerous public libraries and its public hospital provide examples. In 2000, San Francisco embarked on a Branch Library Improvement Program, passing a $105 million bond to upgrade 24 branch libraries to make them ADA- and building-code compliant and seismically safe.[1] Over the course of the next 14 years, San Francisco entered into a series of contracts for the design and construction of new libraries and library renovations.[2] These contracts required architects to design facilities in compliance with all applicable laws, and required builders to construct facilities as they were designed. They also contained indemnification clauses that required contractors to indemnify San Francisco in the event of negligence or breach.[3] It is not an abdication of San Francisco's duty under the ADA to contract

[1] *See* City & County of San Francisco, Voter Information Pamphlet and Sample Ballot, Nov. 7, 2000 Consolidated Presidential Election (available at http://sfpl.org/pdf/main/gic/elections/November7_2000.pdf), at p. 41, P-3.

[2] *See* Branch Library Improvement Program summary (available at http://sfpl.org/?pg=2000002301). This webpage contains links to more information about individual library projects, including the names of architects and construction contractors that San Francisco utilized to carry out these extensive improvements.

[3] Individual Branch Library Improvement Program contracts are on file with the San Francisco Department of Public Works and available to the public.

out the design and construction of a system of fully accessible branch libraries, but is instead the fulfillment of that duty.

In another example, San Francisco recently invested nearly $900 million to rebuild San Francisco General Hospital, a public hospital that also serves as the Level 1 trauma center for the northern San Francisco Peninsula, to make it seismically safe and fully accessible to people with disabilities.[4] San Francisco contracted with outside architects to provide professional engineering and design services for the project, and this contract expressly required that the architects "prepare all designs for the Project in a manner that complies with the ADA" and any other applicable disability rights legislation.[5] The contract also required the architects to indemnify San Francisco to the extent allowed by law for injuries arising from the "negligence, recklessness, or willful misconduct" of the architects.[6] It would be a harsh result indeed if these contract provisions were unenforceable as preempted by the ADA, when one reason to hire specialized assistance in large-scale projects like this one is to secure full compliance with the ADA.

II. The District Court's Preemption Reasoning Relies on Faulty Analysis of Law and Policy

Under the district court's ruling, contractual indemnity provisions that incorporate promises to comply with federal disability-access standards—like

[4] *See, e.g.*, San Francisco Mayor's Office on Disability Transition Plan materials (available at http://sfgov.org/mod/san-francisco-general-hospital-and-trauma-center).

[5] *See* Agreement: San Francisco General Hospital Rebuild Program, at 75-76 [pdf pages 97-98] (available at https://sfgov.legistar.com/View.ashx?M=F&ID=2284951&GUID=22AAE961-BA5B-434F-8FE5-746D8E151B21).

[6] *Id.* at 67-68 [pdf pages 89-90].

those in San Francisco's library and hospital construction contracts just discussed—are unenforceable. The City of Los Angeles persuasively argues that this result is incompatible with preemption principles. As Los Angeles argues, where Congress expresses no indication that the ADA preempts municipalities' remedies against contractor breaches, and where ADA regulations and agency guidance contemplate third-party claims against contractors who fail to adhere to disability-access standards, there is no federal preemption of state law. *See* Dkt. No. 15 at 36-53. The League and CAJPA fully join Los Angeles's preemption arguments but do not repeat them here. Instead, we note that the district court's misapplication of preemption analysis rests in part on two self-reinforcing errors concerning California law and the policy consequences of allowing third-party indemnification claims to proceed.

The first error is in the district court's misunderstanding of California contract law: the court erroneously believed that allowing Los Angeles's claims against Tutor-Saliba and Aecom to proceed would "completely insulate [it] from liability for an ADA . . . violation." ER 10. As discussed above, this is incorrect as a matter of state law. Los Angeles is only permitted to obtain indemnification to the extent that the plaintiffs' harms arose from the third-party defendants' negligence or misconduct; Civil Code § 2782(b) does not permit Los Angeles to insulate itself from liability for its own active fault. And regardless of whether a third-party defendant is able to make good on its indemnity promises, the indemnified public entity remains ultimately responsible to the ADA plaintiff to pay any damages to which the plaintiff is entitled, and to remedy any inaccessible facilities.

The third-party defendants may argue to the contrary by relying on *Equal Rights Center v. Niles Bolton Associates*, 602 F.3d 597 (4th Cir. 2010), which

characterizes indemnity claims as seeking to shift entire responsibility to a third party, in marked contrast to contribution claims, which seek to apportion liability among wrongdoers. *Id.* at 601-02. The Fourth Circuit's nomenclature for contract claims arising under Maryland law should not control the analysis here. In California, contribution is a statutory right that arises among parties to joint and several obligations that allows a paying party to claim a proportionate contribution from other parties to the obligation. Cal. Civ. Code § 1432. Los Angeles does not seek to recover contribution under the Civil Code; instead it seeks indemnification under the terms of its contracts. Where a party has contracted for indemnity, "the extent of that duty must be determined from the contract," not from other sources of the duty. *Rossmoor Sanitation, Inc. v. Pylon, Inc*., 532 P.2d 97, 100 (Cal. 1975).[7]

The district court's second error was in its policy prediction that if municipalities could seek indemnity from contractors for ADA liability, then municipalities would lose important incentives to comply with the ADA. ER 10. This prediction is wrong, both because municipalities retain responsibility for their own wrongdoing, as just discussed, and because risk is reduced when liability is assigned to the party who is best able to control the risk. *See, e.g.,* Eric A. Berg, Bill Hecker, "Accessibility Laws: An Ounce of Prevention Is Worth A Pound of Cure," Constr. Law., Winter 2008, at 5, 7 ("In many relationships directly or

[7] Nor does Los Angeles seek indemnification under California's common law doctrine of equitable indemnity. As that doctrine arose at common law, it allowed the indemnitee to fully offset its losses from the indemnitor, much as the Fourth Circuit characterized the right of indemnity in *Equal Rights Center*. But that conception has long since been superseded. In 1978, the California Supreme Court held that equitable indemnity in California must also be comparative, and liability must be allocated according to fault. *See American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 913 (Cal. 1978). Thus, there is no source of California law from which Los Angeles could seek to insulate itself from its own active wrongdoing with respect to the ADA.

tangentially related to the construction industry, parties regularly assign risks to the parties in the best position to guard against them.").

If the ADA is to best serve its purpose of remedying discrimination against people with disabilities, including discrimination arising from inaccessible public facilities, then those who could prevent discrimination by designing and constructing accessible facilities should not escape liability. However vigilant a public entity attempts to be to ensure that its contractors design and construct ADA-compliant facilities, and however much a public entity invests in contract monitoring, it can never exercise complete control over the execution of public contracts. It does not advance the ADA's purpose to exempt from contractual indemnification liability—a liability they have freely accepted as part of a bargain—those who do have control.

That concern has even greater force when this Court considers the highly technical nature of ADA facilities compliance, as reflected in the detailed ADA Accessibility Guidelines used by the Department of Justice to set construction and alteration standards for public facilities,[8] and the ability of small jurisdictions to develop the in-house expertise necessary to monitor compliance with the guidelines effectively. While it may have seemed reasonable to the district court to place the risk of design errors or construction deviations on a large city that likely has considerable expertise in ADA compliance, it is patently unreasonable—and does not effectuate the purposes of the ADA—to expect the dozens of smaller jurisdictions in California and throughout this Circuit to develop the in-house ability to guarantee ADA compliance as the only alternative to costly liability for

[8] Available at https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background/adaag.

inaccessible public facilities when the specialists they contract with fail to perform competently.

Although the district court here, and the district court in *Independent Living Center of Southern California v. City of Los Angeles*, 973 F. Supp. 2d 1139 (C.D. Cal. 2013), rejected attempts to enforce third-party indemnification clauses as preempted by the ADA, that view is not uniform. In *United States v. Quality Build Construction, Inc.*, 309 F. Supp. 2d 767 (E.D.N.C. 2003) the district court understood that enforcing a contractor's promises to design accessible facilities does not undermine the purposes of the ADA. In that case, the court acknowledged that where a design contractor "had an independent obligation to perform competently and fulfill the terms of its contract" in designing compliant apartment interiors, the apartment building owner could seek contribution from the design contractor pursuant to its contract but could not transfer entire responsibility for complying with the Fair Housing Act Amendments to the contractor. *Id.* at 779.

This Court should adopt the reasoning of *Quality Build Construction*. Making public entities strictly liable for the failure of their contractors to design and build fully accessible public works reduces contractors' incentives to design and construct accessible buildings, deprives public entities of important contract remedies, and robs taxpayers of the benefits of their bargain. Since there is no indication Congress intended such a perverse result in enacting Title II of the ADA, this Court should reject the district court's preemption holding and reinstate Los Angeles's claims against the third-party defendants.

CONCLUSION

For the reasons offered above, the League of California Cities and the California Association of Joint Powers Authorities respectfully submit that this Court should reverse the decision below.

Dated: May 19, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2,370 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on May 19, 2016.

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CERTIFICATE OF SERVICE

I, Pamela Cheeseborough, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on May 19, 2016.

BRIEF OF *AMICI CURIAE*
LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES
IN SUPPORT OF THE CITY OF LOS ANGELES AND IN SUPPORT OF REVERSAL

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant(s):

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Executed May 19, 2016, at San Francisco, California.

*/s/*Pamela Cheeseborough
Pamela Cheeseborough