No.

In the Supreme Court of the United States

ARCHSTONE MULTIFAMILY SERIES I TRUST
and ARCHSTONE,

Petitioners,

v.

NILES BOLTON ASSOCIATES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY A. WINTERS
DAVID M. GOSSETT
Counsel of Record
BRETTE L. STEELE
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
dgossett@mayerbrown.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTION PRESENTED

In this case, the Fourth Circuit held that a developer who acknowledged liability and settled claims asserting violations of the Fair Housing Act of 1968 (FHA), 42 U.S.C. §§ 3601 *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, could not seek indemnification under state law from the architect that directly caused those violations. According to the court of appeals, these statutes impliedly preempt state-law claims that could reduce the incentives for compliance, even though the FHA and ADA are strict-liability statutes that impose liability on developers and others without regard to fault.

The question presented is whether a federal statutory scheme that creates liability without regard to fault, that is entirely silent with respect to the eventual allocation of liability among co-defendants, and that contains no express preemption provision nonetheless impliedly preempts state-law claims for indemnification.

RULE 14.1(b) STATEMENT

The parties to the proceedings below were defendants/cross-plaintiffs/appellants Archstone Multifamily Series I Trust and Archstone; defendant/cross-defendant/appellee Niles Bolton Associates, Inc.; plaintiffs the Equal Rights Center, the American Association of People with Disabilities, and the United Spinal Association; and defendants Clark Realty Builders, LLC, Vika Incorporated, and Meeks Partners.*

Only the parties included in the caption have an interest in this sub-proceeding; the remaining plaintiffs and defendants—the Equal Rights Center, the American Association of People with Disabilities, the United Spinal Association, Clark Realty Builders, LLC, Vika Incorporated, and Meeks Partners—do not.

RULE 29.6 STATEMENT

Petitioner Archstone Multifamily Series I Trust states that its parent entity is Archstone Nominee LP. The parent of Archstone Nominee LP is Archstone Multifamily Principal LP, and the parents of Archstone Multifamily Principal LP are Archstone Multifamily Guarantor LP and Archstone Multifamily Parallel Guarantor I LLC.

Archstone Multifamily Series I Trust further states that three public corporations collectively hold, indirectly, approximately 93% of the equity in

---

* The National Multi Housing Council appeared as an *amicus curiae* in the district court, see Dist. Ct. Dkt. Nos. 71, 72, 75, but was mistakenly listed as a defendant in that court's docketing system as well as in the caption of the court of appeals' decision. See App., *infra*, 1a.

it: Bank of America, N.A. Barclays Bank PLC, and Lehman Brothers Holdings, Inc.

Similarly, Archstone states that, in addition to individual preferred unit holders, it has four parent entities: Archstone Multifamily Series I Trust, Archstone Multifamily Series II LLC, Archstone Multifamily Series III LLC, and Archstone Multifamily Series IV LLC. The parent entity of Archstone Multifamily Series I Trust, Archstone Multifamily Series II LLC, and Archstone Multifamily Series III LLC, is Archstone Nominee LP. The parent of Archstone Nominee LP is Archstone Multifamily Principal LP. The parent entity of Archstone Multifamily Series IV LLC is Archstone Multifamily Series IV Nominee LP, and the parent of that entity is Archstone Multifamily Series IV Principal LP.

Archstone further states that three public corporations collectively hold, indirectly, approximately 87% of the equity in it: Bank of America, N.A. Barclays Bank PLC, and Lehman Brothers Holdings, Inc.

Blank Page

TABLE OF CONTENTS

TABLE OF CONTENTS–continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTION, STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioners Archstone Multifamily Series I Trust and Archstone (collectively Archstone) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–15a) is reported at 602 F.3d 597. The opinion of the district court (App., *infra*, 16a–38a) is reported at 603 F. Supp. 2d 814. The March 18, 2009, final order and judgment of the district court (App., *infra*, 39a–40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause specifies that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * *, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

The relevant provisions of the Fair Housing Act of 1968 (FHA), 42 U.S.C. §§ 3601 *et seq.*, as enacted by Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89, and as

amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, are reproduced in the appendix. See App., *infra*, 41a–46a (reproducing 42 U.S.C. §§ 3601, 3604).

The relevant provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, Pub. L. 101-336, 104 Stat. 327, as amended by the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, are also reproduced in the appendix. See App., *infra*, 47a–58a (reproducing 42 U.S.C. §§ 12101, 12182, 12183).

Finally, 28 C.F.R. § 36.201, a relevant Department of Justice regulation implementing the ADA, is reproduced in the appendix. See App., *infra*, 59a.

STATEMENT

This case presents a deep conflict among the lower courts over when a federal statute that is silent as to the eventual allocation of responsibility among jointly liable parties impliedly preempts state-law methods for allocating the costs of coming into compliance with that federal statute. Here, the Fourth Circuit held that the ADA and FHA preclude the developer of multi-family housing developments from bringing state-law breach-of-contract, indemnification, and professional-negligence claims against the architect that mis-designed those buildings such that they failed to comply with federal disability-access requirements. That decision exacerbates an existing conflict over when federal statutes preempt state-law indemnification remedies; has no basis in the text, purpose, or history of the governing statutes; and could wreak havoc not only on owners of housing developments but also on the entire run of American commerce—every entity whose business is

governed even in part by a federal regulatory scheme. Certiorari is therefore warranted.

A. Statutory Background

1. Congress enacted the Fair Housing Act of 1968 with the explicit policy of providing for "fair housing throughout the United States." 42 U.S.C. § 3601. The statute initially prohibited discrimination on the basis of race, color, religion, or national origin in all housing-related transactions. Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89 (1968). Thus, the FHA prohibited housing providers, municipalities, lending institutions, and insurance companies from refusing to sell or rent a property; discriminating as to the terms, conditions, privileges, or provision of services of a sale or rental property; or representing that a unit is unavailable to someone because of his or her race, color, religion, or national origin. *Ibid.*; see also *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373 (1982).

In 1988, Congress enacted the Fair Housing Amendments Act, which extended the FHA's protections to persons with disabilities. Pub. L. No. 100-430, 102 Stat. 1619 (1988). As amended, Section 3604 states that it shall be unlawful to "discriminate in the sale or rental, or otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). That section defines discrimination to include (A) "a refusal to permit * * * reasonable modifications of existing premises"; (B) "a refusal to make reasonable accommodations in rules, policies, practices, or services"; and (C) "a failure to design and construct [covered multifamily] dwellings in * * * a manner" that is readily accessible to persons with disabilities, including persons in wheelchairs. 42 U.S.C. § 3604(f)(3)(A)–(C).

The statute contains detailed requirements governing the design of covered multifamily dwellings, specifying for example that they must be designed with:

> (I) an accessible route into and through the dwelling;
>
> (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
>
> (III) reinforcements in bathroom walls to allow later installation of grab bars; and
>
> (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

42 U.S.C. § 3604(f)(3)(C)(iii). The Fair Housing Accessibility Guidelines, promulgated by the U.S. Department of Housing and Urban Development (HUD), prescribe exact measurements required for minimum compliance with these rules, including, for example, the specific width of doorframes and the precise placement of light switches. See, *e.g.*, 56 Fed. Reg. 9471, 9506–07 (Mar. 6, 1991).

Under the statute, the "failure to design and construct" buildings in compliance with the mandated accessibility standards results in liability without regard to intent, knowledge, or even negligence. 42 U.S.C. § 3604(f)(3)(C); see also *United States* v. *Quality Built Constr., Inc.*, 309 F. Supp. 2d 756, 760 (E.D.N.C. 2003) ("Defendants' intent is not relevant to the Court's determination of whether a pattern or practice of discrimination exists."); Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Un-*

der the Fair Housing Act, 40 U. Rich. L. Rev. 753, 772–73 (2006) ("Even if the reason many builders fail to comply with § 3604(f)(3)(C) is good faith ignorance of its mandates, it is clear that such ignorance is not a sufficient legal excuse to avoid liability for violating this provision. * * * [A] defendant's state of mind is simply not relevant to the liability issue in § 3604(f)(3)(C) cases, and in particular, a showing that the defendant was motivated by discriminatory intent is not required in such cases.").

The statute is silent as to who is liable for design and construction violations, but lower courts have held that "any entity who contributes to a violation of the FHAA would be liable." See, *e.g.*, *Baltimore Neighborhoods, Inc.* v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 665 (D. Md. 1998); see also *Montana Fair Housing, Inc.* v. *American Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1069 (D. Mont. 1999) (endorsing the approach of *Baltimore Neighborhoods* and applying the "design and construct" requirement to architects, builders, and owners); *United States* v. *Days Inns of Am., Inc.*, 997 F. Supp. 1080, 1083 (C.D. Ill. 1998) ("'Design and construct' is a broad sweep of liability, [encompassing] architects, builders, and planners."). The statute is also silent on the allocation of responsibility among entities jointly responsible for a covered property. It contains no provision addressing any such allocation as a matter of federal law; nor does it contain a provision expressly preempting state-law methods for allocating responsibility (such as contractual provisions or causes of action for indemnity or professional negligence). See App., *infra*, 29a.

2. Congress enacted the Americans with Disabilities Act of 1990 with the express purposes of (1) pro-

viding "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"; (2) developing "clear, strong, consistent, enforceable standards addressing discrimination"; (3) ensuring that the "Federal Government plays a central role in enforcing the standards"; and (4) invoking "the sweep of congressional authority." 42 U.S.C. § 12101(b). To these ends, the ADA prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. 42 U.S.C. §§ 12101 *et seq.*

In particular, Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability * * * by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The statute requires private businesses that serve the public to follow specific architectural standards in new construction and in the alteration of existing buildings, and to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination. See 42 U.S.C. §§ 12182, 12183.[1]

---

[1] The lower courts are divided over whether 42 U.S.C. § 12183 applies directly to architects. Compare *Lonberg* v. *Sanborn Theaters Inc.*, 259 F.3d 1029, 1036 (9th Cir. 2001) ("[O]nly an owner, lessee, lessor, or operator of a noncompliant public accommodation can be liable under Title III of the ADA for the 'design and construct' discrimination described in § 12183(a)."), with *United States* v. *Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1268 (D. Minn. 1997) ("[A]rchitects are not excluded from liability under the ADA as a matter of law."), and *Johanson* v. *Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1177–78 (S. D. Fla. 1997) (same). That split is irrelevant to the question presented here, however, which involves only state-law claims for indemnification.

As relevant to this case, the rental offices in multifamily rental housing developments qualify as "public accommodations" under 28 C.F.R. § 36.104 because they serve as "sales or rental establishment[s]." Therefore, a developer such as Archstone may be found to have violated the ADA if it "discriminates" in the accessibility of its rental offices under the terms of the statute. The ADA defines such "discrimination" to include "a failure to design and construct facilities * * * that are readily accessible to and usable by individuals with disabilities," without regard to knowledge or fault. 42 U.S.C. § 12183(a)(1); see also 42 U.S.C. § 12188(b)(5) (noting that "good faith effort" to comply with ADA's mandates is relevant only with respect to the amount of civil penalties awarded in Attorney General enforcement actions). The ADA also empowers any person who experiences discrimination under § 12183(a) to seek an injunction requiring the alteration of facilities. 42 U.S.C. § 12188(a).

As with the FHA, the statutory text of the ADA contains no provision authorizing allocation of responsibility as a matter of federal law; nor does it contain any provision expressly preempting state-law methods for allocation of responsibility such as breach of contract, indemnity, or professional-negligence actions. The Department of Justice (DOJ), however, is statutorily responsible for implementing Title III of the ADA,[2] and has promulgated a regula-

---

[2] The ADA allocates responsibility for promulgating implementing regulations to multiple agencies. The Equal Employment Opportunity Commission, for example, is responsible for promulgating regulations under Title I (42 U.S.C. § 12116); the Secretary of Transportation is responsible for implementing the transportation provisions (42 U.S.C. § 12186(a)); and DOJ is re-

tion addressing state-law indemnification provisions within the context of commercial leases. Under the ADA, both the owner of a commercial building (such as a shopping mall) and a commercial tenant (such as a store within that building) are liable for any violations of the ADA found within that tenant's space. See 28 C.F.R. § 36.201(b) ("Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of [the ADA]."). The DOJ regulation specifies that these parties may contractually allocate responsibility for any violations of the ADA as they see fit. See *ibid.* ("As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.").

B. Factual Background

1. Archstone is a leading developer and owner of multifamily housing projects throughout the United States. In the 1990s, Archstone hired the architecture firm Niles Bolton Associates, Inc. (Niles Bolton), to design a number of apartment buildings on the East Coast. App., *infra*, 3a. The contracts for each development expressly required Niles Bolton to comply with all applicable laws, including federal disability laws such as the FHA and ADA, and to indemnify Archstone against all losses caused by defects in Niles Bolton's designs. *Id.* at 4a.

In 2004, the Equal Rights Center sent "testers" to inspect several Archstone properties, including five buildings designed by Niles Bolton. On the basis

---

sponsible for implementing the non-transportation public-accommodation provisions (42 U.S.C. § 12186(b)).

of technical violations found at those properties, plaintiffs filed a lawsuit against Archstone, Niles Bolton, and three other defendants[3] alleging that more than 100 multifamily properties owned by Archstone were not fully compliant with the ADA and FHA. App., *infra*, 17a.

After thoroughly investigating the allegations, Archstone acknowledged technical violations in 71 of the properties identified in the complaint. App., *infra*, 3a. Archstone entered into a consent decree whereby it agreed to retrofit the 71 properties and to pay plaintiffs $1.4 million in damages. *Ibid.* To date, Archstone has spent more than $60 million retrofitting the 71 buildings, including $7.5 million in retrofitting expenses for the 15 properties designed by Niles Bolton. JA 603. Of the $7.5 million in retrofitting expenses at the properties designed by Niles Bolton, approximately $3.8 million in expenses are directly attributable to errors in Niles Bolton's designs. JA 458–77, 603.[4] Although Niles Bolton directly caused these violations, it did not contribute to the settlement payment or offset any of the retrofitting costs. App., *infra*, 3a.

In July 2005, Archstone filed a cross-claim against Niles Bolton to recoup the portion of the

---

[3] In addition to Archstone and Niles Bolton, the complaint named an architect, a builder, and a civil engineer as defendants. These entities were not involved in the design or construction of the properties at issue in the cross-claim underlying this petition. JA 300–01.

[4] The $3.8 million figure represents the sum of the remediation expenses for each defect attributable to Niles Bolton. JA 458–77. The figure does not include interest incurred since the filing of the cross-claim at issue in this petition.

damages and retrofitting costs it incurred because Niles Bolton's designs violated the accessibility requirements of the FHA and the ADA. App., *infra*, 3a. The cross-claim pled state-law causes of action for breach of contract, professional negligence, and express and implied indemnification. *Id.* at 3a–4a. Subsequently, Archstone moved to amend the cross-claim by adding a claim for contribution. *Id.* at 5a–6a.[5] Archstone filed a motion for partial summary judgment as to Niles Bolton's liability, and Niles Bolton brought a cross-motion for summary judgment. App., *infra*, 19a.

2. On March 18, 2009, the district court denied Archstone's motion to amend and dismissed Archstone's cross-claims as preempted by the ADA and the FHA. App., *infra*, 16a–38a. Relying heavily upon the reasoning of *Baker, Watts & Co.* v. *Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc)—a case arising under a different statute, which conditions liability on a finding of negligent wrongdoing rather than imposing liability without regard to the defendant's fault—the court found that Archstone's indemnification claims are "antithetical to Congress' purpose in enacting the FHA and the ADA." App., *infra*, 35a. The court also held, without analysis, that Archstone's breach-of-contract and

---

[5] Although the lower courts seemed at times confused as to the nature of petitioners' claims, see App., *infra*, 14a–15a, 26a, the theory underlying each of those claims was that Niles Bolton should be liable for those portions of petitioners' costs directly attributable to errors in Niles Bolton's plans (but not for any other violations at the properties designed by Niles Bolton nor for violations at any other property). See, *e.g.*, JA 370–71, 637–38.

negligence claims are preempted as "*de facto* claims for indemnification." *Id.* at 34a.[6]

The Fourth Circuit affirmed. App., *infra*, 1a–15a. Specifically, the court of appeals held that "[i]n finding Archstone's state-law claims preempted, the district court correctly used the guidance [the Fourth Circuit had previously] set forth in *Baker, Watts*." *Id.* at 8a. The court reasoned that "the regulatory purposes of the FHA and ADA would be undermined by allowing a claim for indemnity" because contractual indemnity "diminishes [an owner's] incentive to ensure compliance with discrimination laws." *Id.* at 10a. The court also opined that, if a developer could be indemnified for violations despite a non-delegable duty to comply with the FHA and ADA, "the developer will not be accountable for discriminatory practices in building apartment housing." *Ibid.* Finally, the court held that "Archstone's state-law breach of contract and negligence claims [are] *de facto* indemnification claims and, thus, preempted." *Id.* at 10a–11a.

REASONS FOR GRANTING THE PETITION

Review is warranted for three separate and compelling reasons. First, this case deepens an intractable conflict among the lower courts regarding the availability of state-law indemnification remedies for violations of strict-liability federal laws where the federal law neither expressly provides for indemnification nor expressly preempts state-law indemnifica-

---

[6] The district court also denied Archstone's motion to amend to add a contribution claim on the grounds that amendment would be both futile and prejudicial. See App., *infra*, 26a–27a. The merits of that determination are irrelevant for the purposes of this petition because Archstone does not seek further review of the denial.

tion actions. See Part A, *infra*. Second, in addition to aggravating this circuit split, the Fourth Circuit's decision is plainly wrong, and is fundamentally inconsistent with this Court's preemption jurisprudence. See Part B, *infra*. Third, the Fourth Circuit's decision undermines the goals of the FHA and ADA, uproots settled expectations in the housing industry, and calls into question cross-industry standard practices of indemnity and insurance. See Part C, *infra*. Because this case presents an ideal vehicle for resolving a question of exceptional practical importance, this Court's review is warranted.

A. The Holding Below Exacerbates A Circuit Split Over When Federal Statutes Preempt State-Law Indemnification Remedies.

The lower courts are irreconcilably divided over the question whether a no-fault federal statutory scheme that contains no express preemption provision impliedly preempts state-law claims for indemnification.[7] The Fourth Circuit held in this case that such statutes preempt state-law indemnification claims when the federal statute is "'regulatory rather than compensatory.'" App., *infra*, 9a. The Tenth Circuit agrees. See *Martin* v. *Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992). By contrast, the Sixth, Eleventh, and Federal Circuits and the Su-

---

[7] State law claims for indemnity arise under either contractual indemnity agreements or state laws that impose a duty of indemnity regardless of contract. See, *e.g.*, *Herrero* v. *Atkinson*, 38 Cal. Rptr. 490, 492-93 (Cal. Ct. App. 1964). Whether a particular indemnity action proceeds under contract or common law is irrelevant to the preemption question presented here. Indeed, the Fourth Circuit did not distinguish between express and implied indemnity claims in its analysis. See App., *infra*, 10a.

preme Court of Minnesota have concluded that when a federal statutory scheme does not require a finding of culpability (that is, when the defendant need not be adjudged a "wrongdoer" to be liable under the statute), indemnification does not offend any federal policy and therefore is not impliedly preempted.

As a result of this intractable conflict, certain courts across the Nation are striking down contractual indemnity clauses that other courts are upholding. This Court's review is necessary to resolve the confusion among the lower courts and to restore uniformity to federal preemption law in this setting.

1. To place this circuit split in context, it is easiest to start with a set of cases that address preemption in a related but distinct arena. A number of lower courts have held—rightly or wrongly—that federal statutes that are designed to punish *culpable* conduct, but that are silent as to whether the defendant may be indemnified for liability under that statute, impliedly preempt state-law indemnification actions.[8] That was the Fourth Circuit's holding in *Baker, Watts*, for example, on which the court then relied here.

In *Baker, Watts*, the Fourth Circuit held that § 12(2) of the Securities Act of 1933, Pub. L. No. 7322, 48 Stat. 74, which imposes a "reasonable care" standard on sellers of securities (15 U.S.C. § 77l), preempts state-law indemnification clauses because they would effectively override the Act's reasonable-care requirement. 876 F.2d at 1105. The court ex-

---

[8] These cases are probably inconsistent with the presumption against preemption, see page 25, *infra*, but the Court would not need to address these cases to resolve the question presented here.

plained that "a right of action for indemnification" in this context "would frustrate the statute's goal of encouraging diligence and *discouraging negligence* in securities transactions." *Ibid.* (emphasis added). Thus, the court concluded, a securities-law "wrongdoer" may not "shift its entire responsibility for federal violations on the basis of a collateral state action for indemnification" because doing so "would frustrate the basic enforcement of federal securities law." *Id.* at 1108; see also, *e.g.*, *Eichenholtz* v. *Brennan*, 52 F.3d 478, 483–85 (3d Cir. 1995) (same); *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222, 1232 (9th Cir. 1989) (same); *Johnson* v. *Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009) (similar in the context of ERISA fiduciary liability).

The question presented here is distinct from that presented in *Baker, Watts* and similar cases: whether federal *strict-liability* statutes—that is, federal statutes that impose liability for statutory violations regardless of the culpability of the regulated party—preempt state-law indemnification actions. The lower courts are deeply divided on this issue.

2. As we have explained, a violation of the ADA requires merely that a defendant fail "to design and construct facilities * * * that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(1). Similarly, a violation of the FHA takes place when a defendant "fail[s] to design and construct those dwellings in such a manner" that they are accessible to individuals with disabilities. 42 U.S.C. § 3604(f)(3)(c). As strict-liability laws, neither of these statutes requires that a defendant have acted negligently, recklessly, or deliberately wrongfully before imposing liability. Thus, these statutes are not designed to punish actors for their *wrong-*

doing; they are instead designed to provide for "fair housing throughout the United States" (42 U.S.C. § 3601), regardless of fault.

In finding petitioners' claims here preempted, the court below extended its prior holding in *Baker, Watts*, which specifically relied on the defendant's negligence, to statutes that do not require culpability. The court reasoned that indemnification "represent[s] an obstacle" to the implementation of *every* federal law (App., *infra*, 9a), so long as the "goals" of the federal law are "regulatory" (when Congress intends to "prevent[]" certain conduct) rather than "compensatory" (when Congress intends only to provide a "remed[y]" for past harms). *Ibid.* Because indemnification "diminishes [a party's] incentive to ensure compliance" with a "regulatory" law, in other words, no party in the Fourth Circuit may ever seek indemnification for violations of such laws, regardless of whether that statute requires a finding of culpable wrongdoing. *Id.* at 10a. Because virtually every federal statute is in some sense intended to prevent certain conduct—rather than merely to remedy the negative effects of that conduct—parties in the Fourth Circuit are now effectively prohibited from seeking state-law indemnification for alleged violations of essentially any federal law.

3. The Fourth Circuit is not alone in holding that no-fault federal statutes preempt state-law indemnification claims. In *Martin* v. *Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992), for example, the Tenth Circuit considered implied conflict preemption under the Fair Labor Standards Act (FLSA), which, like the ADA and FHA, is a no-fault statute that is silent on preemption. The defendant, a child-care service provider, had committed "several overtime

[pay] violations" and raised third-party indemnification claims against its day-care-center supervisors, who it asserted were responsible for the violations. *Id.* at 1406; see also *Brock* v. *Gingerbread House, Inc.*, 907 F.2d 115, 116 (10th Cir. 1989) (recounting the case history).

The Tenth Circuit held the indemnification claims preempted. Employing the same reasoning as the Fourth Circuit here, the court concluded that Congress's "intent to provide minimum standards in the work place would not be served by allowing a state cause of action for indemnity," because "an employer who believed that any violation of the provisions could be recovered" under an indemnity agreement "would have a diminished incentive to comply with the statute." *Martin*, 977 F.2d at 1407 (internal quotation marks and alterations omitted). Because "[i]ndemnity actions against employees work against the purposes of the FLSA," the court held, "[t]he conflict between the purposes of federal law and a state cause of action require the latter to yield." *Id.* at 1407–08.

Accordingly, petitioners would have obtained the same result if they had litigated their indemnity claims in the Tenth Circuit. Indeed, the rationale underlying the decision below—that indemnification "diminishes [a party's] incentive to ensure compliance" with any "regulatory" or "preventative" law (App., *infra*, 9a–10a)—mirrors perfectly the Tenth Circuit's approach in *Martin*. At bottom, the Tenth Circuit, like the Fourth, has determined that a federal law that is silent on preemption may nevertheless preempt state-law indemnity claims, entirely apart from any conflict with a statutory requirement that only culpable wrongdoers be liable, because (in

those courts' views) indemnity agreements categorically discourage compliance with the law.

4. The decisions of the Fourth and Tenth Circuits cannot be squared with holdings of the Sixth, Eleventh, and Federal Circuits and the Supreme Court of Minnesota, each of which has concluded that the *sine qua non* for implied federal preemption of state-law indemnification claims is a conflict with an express federal requirement of culpability.[9] If the parties had litigated their dispute in any of these other jurisdictions, petitioners' indemnification claims would have been allowed to proceed.

a. The Eleventh Circuit has expressly concluded that state-law indemnification actions are not preempted under a no-fault federal statute. In *Foley* v. *Luster*, 249 F.3d 1281 (11th Cir. 2001), that court addressed whether the Copyright Act preempts indemnity actions between infringers.[10] The case involved a videographer hired to produce a promotional video for a set of related companies. *Id.* at 1284. In

---

[9] The decision below is also in direct conflict with the decisions of several state trial courts, which have held that the ADA and FHA do not preempt state-law indemnity claims. See, *e.g.*, *Miami* v. *HDR Eng'g, Inc.*, No. 09-57028 CA 30. (Fla. Cir. Ct. Feb. 12, 2010) (expressly rejecting the district court's holding in this case and concluding that the ADA does not preempt state-law indemnity claims); *Archstone-Smith Trust* v. *Van Tilburg*, No. 08-CV-8351, slip op. at *3 (Colo. Dist. Ct. Nov. 6, 2009) (same with respect to both the FHA and the ADA); *Archstone-Smith Trust* v. *Architects Orange*, No. 37-2008-00092239, slip. op. at 1–2 (Cal. Sup. Ct. June 12, 2009) (same).

[10] The Copyright Act provides that a copyright holder "has the exclusive rights * * * to authorize," among other things, the "reproduc[tion of] the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1). The Act contains no fault element.

producing the video, the videographer used copyrighted songs without permission. *Ibid.* The copyright owners filed suit against both the videographer who made the video and the companies that used it. *Id.* at 1284–85. The defendant companies then filed cross-claims for indemnification against the videographer, who argued that the indemnification claims were preempted. *Id.* at 1285.

The Eleventh Circuit concluded that the indemnification claims were not preempted. The court reasoned that when a federal statute lacks a culpability requirement—and thus when indemnity bears only on "the *allocation of responsibility*" among defendants (*id.* at 1286) without "intrud[ing] upon the * * * rights guaranteed by" or duties owed under the federal law (*id.* at 1288)—preemption is not appropriate. The court concluded that because the Copyright Act is concerned only with "protect[ing] the rights of copyright holders" without regard for the level of culpability of or the apportionment of liability among defendants, the Act does not "govern cases between infringers." *Id.* at 1287. Thus, because "[n]othing in the language of [the Act] explicitly prohibits indemnity suits" (*ibid.*),[11] the Eleventh Circuit held that the companies' indemnity suit could proceed. *Id.* at 1289.

The Eleventh Circuit's decision in *Foley* is in square conflict with the decision below. An action for

---

[11] Although the Copyright Act contains a preemption provision (17 U.S.C. § 301(a)), the Eleventh Circuit held that provision "not applicable" and "irrelevant" to the case, and instead "appl[ied] general preemption law to determine whether [the] indemnity case brought pursuant to Florida common law [was] preempted by the Act." *Foley*, 249 F.3d at 1286.

indemnity concerning a violation of the ADA and FHA obviously would not "intrude upon" the duties owed under those laws (*Foley*, 249 F.3d at 1288) because, like the Copyright Act, neither contains a fault element with which indemnification might conflict. Indeed, under both statutes, "a suit for indemnity between defendants * * * is not an obstacle to congressional intent, which was to protect [plaintiffs] in a comprehensive and uniform way." *Id.* at 1287. Petitioners' indemnity action, if allowed to proceed, would instead bear only on "the *allocation of responsibility*" among the defendants. *Id.* at 1286. There is thus little doubt that petitioners would have prevailed in the Eleventh Circuit.

b. The Federal Circuit adopted comparable reasoning when rejecting an argument for implied preemption under the U.S. patent laws. In *Cover* v. *Hydramatic Packing Co.*, 83 F.3d 1390 (Fed. Cir. 1996), a patent holder brought an infringement action against a lighting-fixture manufacturer that directly violated a patent and an insulation manufacturer that contributed to the infringement. *Id.* at 1391. The insulation manufacturer then filed a cross-claim for indemnification under the theory that it merely manufactured the insulation to the designs and specifications provided by the fixture manufacturer. *Id.* at 1391–92.

The Federal Circuit held that there was "no conflict pre-emption" in this instance because state indemnification law "neither renders compliance with the patent code a 'physical impossibility' nor 'stands as an obstacle to the accomplishment and execution' of the patent laws." *Id.* at 1393. The court reasoned that "patent law defines rights between the patentee and persons who wish to make, use, sell or offer for

sale the patented invention"; it does not require culpability or otherwise concern the eventual allocation of liability among joint infringers. *Ibid.* Thus, because the joint infringers settled with the patentee, "the patentee and the patent code are no longer in the picture" and there can be no conflict with cross-claims for indemnification. *Ibid.*

The Federal Circuit's decision in *Cover*, like the Eleventh Circuit's decision in Foley, cannot be reconciled with the Fourth Circuit's decision below. The ADA and the FHA define the rights and remedies between persons with disabilities and the businesses that own, design or construct noncompliant buildings. 42 U.S.C. §§ 3604, 12183. Once one defendant settles with the plaintiffs with disabilities—as Archstone has done here—the ADA and the FHA are "no longer in the picture." *Cover*, 83 F.3d at 1393. Accordingly, under the Federal Circuit's reasoning, there can be no conflict preemption for cross-claims of indemnification.

c. The Sixth Circuit also recently rejected the argument that a federal law impliedly preempts a state-law indemnity claim, in *Delay* v. *Rosenthal Collins Group, LLC*, 585 F.3d 1003 (6th Cir. 2009). That case addressed whether the indemnification claim of an employee supervisor, Delay, was impliedly preempted under the Commodities Exchange Act (CEA), Pub. L. No. 74-765, 49 Stat. 149 (1936). In the underlying action, the Commodity Futures Trading Commission alleged that Delay had violated several provisions of the CEA by, among other things, failing to "diligently supervise" the handling of commodity interest accounts, in violation of 17 C.F.R. § 166.3. See *Delay* v. *Rosenthal Collins Group, LLC*, No. 2:07-CV-568, 2008 WL 2225717, at *2 (S.D. Ohio May 27,

2008). While the provisions Delay had been accused of violating required a finding of at least negligent wrongdoing, he was exonerated at trial and found not to have violated the applicable standard of care. *Delay*, 585 F.3d at 1004. Delay later sued his employer to recover defense costs, but the district court dismissed the suit as preempted by the CEA. *Ibid.*

The Sixth Circuit reversed, in a decision fundamentally inconsistent with the Fourth Circuit's in this case. According to the Sixth Circuit, a "predicate" to finding a state-law indemnification suit preempted "is that the party seeking indemnification is a 'wrongdoer'" under the purportedly preempting federal law. *Id.* at 1006. Only then would "allowing [a defendant] to enforce a state-law indemnification right * * * frustrate and defeat" the statute's purposes. *Ibid.* (internal quotation marks omitted). But if the party seeking indemnification is *not* a "wrongdoer"—*i.e.*, if he has not been found at fault under the federal law, whether because he has been exonerated or because the relevant statute imposes liability without regard to fault—and if the statute "says nothing about indemnification," then there is "no [federal] policy contrary to an [indemnity] award." *Ibid.* (internal quotation marks omitted). The court accordingly remanded with instructions to permit the indemnity action to proceed. *Id.* at 1007.

Like *Foley* and *Cover*, *Delay* is at loggerheads with the decision below. Because neither the ADA nor the FHA imposes a particular standard of care, parties are held liable under these statutes entirely without regard to culpability. But in the Sixth Circuit, only when the indemnified party is adjudged a "wrongdoer" under federal law would "allowing [it] to enforce a state-law indemnification right * * * fru-

strate and defeat" the federal statute's purposes. 585 F.3d at 1006 (internal quotation marks omitted). It is not enough, therefore, that a law simply be "regulatory" to impliedly preempt an indemnification agreement. The conflict is accordingly clear.

d. The same result would be reached were this case to be litigated in the Minnesota state courts. In *Engvall* v. *Soo Line R.R. Co.*, 632 N.W.2d 560 (Minn. 2001), the Supreme Court of Minnesota concluded that the Locomotive Inspection Act (LIA), Pub. L. No. 103-272, 108 Stat. 745 (1994), did not preempt state-law indemnification claims. Although the cross-defendant in that case apparently framed its argument in terms of field preemption instead of conflict preemption, see 632 N.W.2d at 570–71, the case involved circumstances analytically indistinguishable from those at issue here.

A train engineer was injured while operating a locomotive operated by the Soo Line Railroad Company and manufactured by General Motors. *Id.* at 563. The engineer sued Soo Line under the Federal Employers' Liability Act (FELA) for a violation of the LIA, which imposes, through FELA, certain non-delegable, strict-liability duties on railroads.[12] Soo Line in turn filed a third-party complaint against General Motors seeking contribution and indemnifi-

---

[12] The LIA requires that railroads use locomotives that "are in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1). A violation of the LIA (which does not itself provide a private right of action) conclusively establishes negligence *per se* for purposes of FELA, regardless of fault. See *Engvall*, 632 N.W.2d at 568 ("[A] railroad employee may use an LIA violation to establish negligence *per se* in a FELA action.")

cation under Minnesota state common law. *Id.* at 563–64.

The trial court dismissed the third-party complaint as preempted by the LIA, but the Supreme Court of Minnesota reversed. The court reasoned that so long as an indemnity action does not "impose" a separate or distinct "standard of care" from that provided under the federal law, there is no inconsistency between an indemnity action and the federal statute. *Id.* at 570–71. And in that case, because the third-party complaint against GM did not involve imposing a conflicting fault standard, "there [was] no danger" that permitting the indemnity action to proceed would "undermin[e] * * * nationwide uniformity" in the enforcement of the LIA. *Id.* at 570–71.[13]

* * * * *

This disagreement among the lower courts does not rest on differences in the statutory schemes at issue in these cases, or on the specific fact patterns presented to those courts. The nature of the question presented in each case is remarkably consistent. The

---

[13] It bears mentioning that in addressing indemnification claims under circumstances similar to those at issue in this case, several other courts have conflated the question whether a federal law *itself* provides for an implied right to indemnification as a matter of federal law (despite the presumption against implied federal rights of action) with the question whether a federal law preempts an independent *state-law* right of indemnification (where the presumption against preemption would counsel in favor of allowing such claims to proceed). See, *e.g.*, *Herman* v. *RSR Sec. Serv. Ltd.*, 172 F.3d 132 (2d Cir. 1999); *United States* v. *Murphy Dev., LLC*, No. 3:08-0960, 2009 WL 3614829, at *2 (M.D. Tenn. Oct. 27, 2009); see also *Delay*, 585 F.3d at 1006–07. The lower courts' repeated conflation of these two issues provides another reason that this Court should grant review to clarify the law concerning the question presented.

divergent results therefore rest solely on the courts' differing legal determinations concerning preemption: in the Fourth and Tenth Circuits' views, on the one hand, a strict-liability federal law that is silent on preemption impliedly preempts state-law indemnity claims because indemnity agreements categorically discourage compliance with "regulatory" laws; in the Sixth, Eleventh, and Federal Circuits' and Minnesota Supreme Court's views, on the other hand, indemnity suits are impliedly preempted only when indemnity would conflict with a statutory purpose of punishing culpable actors. The upshot of the disagreement among the lower courts is clear: whether parties will be indemnified for a violation of federal law turns on nothing more than the jurisdiction in which they litigate their claims. This Court's intervention is accordingly warranted.

B. Review Is Also Warranted Because The Decision Below Is Inconsistent With This Court's Conflict-Preemption Precedents And Is Clearly Incorrect.

The decision below not only exacerbates a circuit split; it is also inconsistent with this Court's conflict-preemption cases and plainly incorrect.

All agree that there is no express-preemption provision in either the FHA or the ADA, and thus that petitioners' state-law indemnification claims are not expressly preempted. Nor has anyone asserted that it would be impossible for the parties to comply with these federal laws while also allocating ultimate responsibility for compliance pursuant to state contract or common law. The lower courts thus found petitioners' state-law claims to be preempted under the doctrine of obstacle preemption. According to the Fourth Circuit, petitioners' state-law claims "stand[]

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." App., *infra*, 8a (quoting *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995), in turn quoting *Hines* v. *Davdowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

In so holding, the court of appeals ignored the analytic framework that this Court has mandated. But beyond that, the lower court's analysis is incorrect on its own terms.

1. As this Court has repeatedly recognized, conflict-preemption analysis "must be guided by two cornerstones of * * * pre-emption jurisprudence." *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194 (2009). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Ibid.* (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)). Second, the preemption analysis begins with the presumption against preemption—"'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.'" *Ibid.* (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "This assumption 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 (1977) (internal quotation marks omitted). And as this Court counseled in *Wyeth*, Congress's "silence on [a conflict-preemption] issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend" to preempt state-law claims. 129 S. Ct. at 1200.

In determining that petitioners' state-law claims were preempted, the court of appeals in this case did

not even mention the presumption against preemption. Instead—quoting a 22-year-old Fourth Circuit case—the lower court stated that "'[p]reemption under an obstacle preemption theory is more an exercise of policy choices by a court than strict statutory construction.'" App., *infra*, 8a (quoting *Abbot* v. *Am. Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988) (internal alterations omitted). By ignoring this Court's more recent conflict-preemption case law, and in particular the Court's analysis of congressional silence in *Wyeth*, the lower court plainly erred.

2. The lower court's analysis would in any event clearly be wrong even if the presumption against preemption were not applicable here. According to the Fourth Circuit, the "regulatory purposes of the FHA and the ADA would be undermined by allowing a claim for indemnity." App., *infra*, 10a. The court reasoned that indemnity would be inconsistent with an owner's non-delegable duty to comply with the statutes because it would diminish the incentives for compliance by allowing an owner to escape accountability. *Ibid.* This unsupported assumption is plainly incorrect and in any event insufficient to overcome the presumption against preemption.

First, the Fourth Circuit misinterpreted the meaning and scope of Archstone's non-delegable duty to comply with the ADA and FHA. As this Court has explained, actions under discrimination statutes are "in effect, * * * tort action[s]," and "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). Thus, a "non-delegable" duty of compliance does not preclude an owner from assert-

ing indemnification claims; it simply means that an owner cannot escape its vicarious liability to plaintiffs even if it "has * * * done everything that could reasonably be required of" it. *Id.* at 290. (internal quotation marks omitted). While an owner cannot insulate itself against a suit by a plaintiff with a disability, "it is not inconsistent with [the owner's] nondelegable * * * duty to [plaintiffs] for" the architect "to owe a separate but concurrent duty enforceable by" the owner, including in an action for indemnity. *Ellison* v. *Shell Oil Co.*, 882 F.2d 349, 353 (9th Cir. 1989) (allowing a defendant owing a non-delegable duty to bring a state-law claim for partial indemnity in the context of the Federal Employers' Liability Act).

Second, the Fourth Circuit erred in assuming that the availability of indemnity from architects would reduce an owner's or developer's incentive to ensure that its properties comply with federal disability-access rules. Owners retain "a strong incentive to monitor compliance" with the statutes, *Botosan* v. *Paul McNally Realty*, 216 F.3d 827, 834 (9th Cir. 2000), because a right of indemnification does not preclude lawsuits by first-party plaintiffs. Indeed, because the obligation to ensure ADA and FHA compliance is non-delegable, plaintiffs have the option of suing any of the participants in the design and construction of a public accommodation. Owners are usually the most expedient target for such lawsuits because in most instances they are readily identifiable, located within the forum, and can be compelled to remediate violations in the buildings they own. Furthermore, if an architect, builder, or other responsible party is judgment-proof, the owner may be saddled with the full cost of remediating the violations. Thus, the availability of a state-law or contractual right of indemnification against architects or

builders does not undercut owners' incentives to ensure that their buildings comply with the ADA and FHA. See, *e.g.*, *Saranillio* v. *Silva*, 889 P.2d 685, 698 (Haw. 1995) (recognizing that "the right of indemnity may be of little value in cases where, for instance, the [indemnitor] is judgment proof."); Helen S. Scott, *Resurrecting Indemnification: Contribution Clauses In Underwriting Agreements*, 61 N.Y.U. L. Rev. 223, 255 (1986) ("even an underwriter who has been completely indemnified has an incentive to investigate issues since he is not protected against an issuer who becomes insolvent before satisfying the judgment").

Third, the Fourth Circuit missed the mark in assuming that indemnity claims undermine the purpose of the ADA and FHA, when in fact they further the congressional purpose of improving accessibility and eliminating discrimination by ensuring that the primary violators are held accountable for designing or constructing inaccessible buildings. Congress could not have intended to allow an architect who caused statutory violations of the FHA or ADA to walk away from the accessibility violations it caused without paying even a dollar to remedy them. See, *e.g.*, *Baltimore Neighborhoods, Inc.* v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 664 (D. Md. 1998) (observing that "allowing [the] architect[] * * * to escape liability" would obstruct the purposes of the FHA). Indeed, the congressional objective of providing "clear, strong, consistent, enforceable standards" can only be achieved if those standards are applicable to all parties in a position to affect compliance. See, *e.g.*, *United States* v. *Tanski*, No. 1:04-CV-714, 2007 WL 1017020, at *22 (N.D.N.Y. Mar. 30, 2007) (noting in the FHA context that the statutory purpose "is best served by imposing broad liability on all those * * *

entities * * * involved in designing and constructing * * * a covered multifamily dwelling").

Thus, there is no demonstrable conflict between indemnity claims and the congressional purposes underlying the ADA and the FHA. Review is warranted because the Fourth Circuit plainly erred by turning the presumption of preemption on its head and presuming preemption in the absence of any evidence of a true conflict.

C. The Issue Here Is Of Substantial Practical Importance.

Proper resolution of the question presented is a matter of exceptional practical importance.

1. The Fourth Circuit's decision, if not reversed by this Court, could drastically reduce the incentives for architects to comply with the ADA and FHA; and it could have a profound effect on the willingness of owners and developers to settle ADA and FHA litigation. If architects can avoid liability for defective architectural designs when the owner settles, their incentives to comply with these statutes will be greatly decreased. *Baltimore Neighborhoods*, 3 F. Supp. 2d at 664. Additionally, the Fourth Circuit's ruling will provide strong disincentives for owners and developers to promptly settle with plaintiffs and remediate violations because by doing so the owners and developers would forfeit any right of recovery against the architects who actually designed the noncompliant plans (or contractors who built a correctly designed property in a noncompliant fashion). Instead, owners and developers may be forced to litigate cases to the bitter end in order to obtain judicial apportionment of liability between the legally responsible parties. See, *e.g.*, Restatement (Third) of

Torts: Apportionment of Liability §§ A18, 23 (2000) (discussing right to apportionment of liability between jointly liable tortfeasors). This result undermines the fundamental purposes of the ADA and the FHA to improve access to persons with disabilities, see pages 3–6, *supra*, by misaligning incentives and introducing unnecessary delays.

2. The Fourth Circuit's decision also calls into doubt the continuing validity of the DOJ regulation that expressly permits owners and commercial tenants to allocate by contract responsibility for ensuring compliance with the ADA. 28 C.F.R. § 36.201(b). In promulgating that regulation, DOJ necessarily concluded that indemnity between defendants is not antithetical to the purposes of the ADA. Courts applying Section 36.201(b) have agreed—they uniformly have held that contractual indemnification in accordance with this regulation is acceptable. See, *e.g.*, *Botosan*, 216 F.3d at 833 (observing that the regulation allows the parties to "allocate responsibility * * * for compliance" as they see fit); *Access4All, Inc.* v. *Trump Int'l Hotel & Tower Condo.*, No. 04-CV-7497, 2007 WL 633951, at *6 (S.D.N.Y. Feb. 26, 2007) (commenting that the right to indemnity under the ADA is "uncontroversial").

Although Section 36.201(b) does not apply to indemnification claims between owners and architects, there is no plausible reason why an owner's indemnity claims against a tenant would be consistent with the ADA while a claim against an architect would create a conflict requiring preemption. In both circumstances, the owner seeks to recover amounts for which it is vicariously liable under the statute. Indeed, Archstone argued below that a finding of implied preemption in this case would constructively

invalidate this DOJ regulation, but the Fourth Circuit rejected this argument in a single footnote without any substantive analysis. App., *infra*, 10a n.1.

3. The practical implications of the broader circuit split identified here extend far beyond the field of multifamily housing. Indeed, the reasoning of the Fourth and Tenth Circuits could be used to invalidate indemnification agreements under almost any federal "regulatory" statute if indemnification could theoretically diminish incentives for compliance. The reasoning could even be extended to invalidate insurance contracts, because there is no plausible basis for distinguishing insurance from other indemnity agreements under the Fourth and Tenth Circuit's reasoning. See, *e.g.*, *Andover Newton Theological Sch., Inc.* v. *Cont'l Cas. Co.*, 930 F.2d 89, 94 (1st Cir. 1991) (upholding insurance coverage of discrimination resulting from a "reckless disregard of federal law"); *Solo Cup Co.* v. *Fed. Ins.* Co., 619 F.2d 1178, 1187 (7th Cir. 1980) (upholding insurance coverage for disparate-impact discrimination claims).The case's importance is compounded by the frequency with which the issue arises. Indemnification provisions are "ubiquitous" in American business (Wallace P. Mullin & Christopher M. Snyder, *Should Firms Be Allowed To Indemnify Their Employees for Sanctions*?, 26 J.L. Econ. & Org. 30, 31 (2010)), influencing virtually every relationship between or among companies doing business together. This is especially so in the circumstances presented here: "Indemnity issues pervade * * * construction law," where "[c]laims of indemnity invariably follow" any loss or liability related to or arising from construction of new facilities like petitioners' apartment buildings. Roger W. Stone & Jeffrey A. Stone, *Indemnity In Iowa Construction Law*, 54 Drake L. Rev. 125, 126

(2005). See also Carri Becker, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 Hastings Women's L.J. 93, 112 (2006) (noting that commercial leases frequently require a tenant to indemnify a landlord for ADA violations caused by that tenant). It thus comes as no surprise that parties frequently litigate state-law indemnification claims in connection with violations of various federal laws.

In addition to the broad scope of cases potentially implicated by the split among the lower courts, the high stakes at issue in many of these cases further increase the need for this Court's intervention. As scholars have documented, "the dollar amounts at stake [in indemnity actions] can be staggering," regularly involving the allocations of millions (sometimes even hundreds of millions) of dollars in damages and costs. Andrew M. Johnston, Amy L. Simmerman, Jeffrey M. Gorris, *Recent Delaware Law Developments in Advancement and Indemnification: An Analytic Guide*, 6 N.Y.U. J. L. & Bus. 81, 82 (2009) (collecting recent cases involving indemnity claims for tens and hundreds of millions of dollars). And it is often unclear who will bear the high costs associated with an indemnity enforcement action. See Earl B. Slavitt & Donna J. Pugh, *Sticks and Bricks, Dollars and Sense: The ADA and Nonresidential Real Estate*, 81 Ill. B.J. 314, 317 (1993) (discussing potential parties to a real-estate transaction who might be liable for high costs when indemnification agreements are used).

Indeed, that is precisely the case here: the cost of bringing all of petitioners' properties into compliance with the ADA and FHA has exceeded $60 million—and the portion directly attributable to Niles Bolton's

designs (and for which petitioners seek recovery) is nearly $3.8 million. Whether petitioners will bear that cost—despite respondent's wrongdoing, and despite respondent's contractual obligation to indemnify petitioners for those costs—turns entirely on the proper resolution of the question presented. This Court's review is thus warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GARY A. WINTERS
DAVID M. GOSSETT
Counsel of Record
BRETTE L. STEELE
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
dgossett@mayerbrown.com

Counsel for Petitioners

JULY 2010