No. 10-103

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether Petitioners have presented compelling evidence to grant the Petition, when the Fourth Circuit's opinion, which holds that a party who has violated 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.*, may not seek indemnity under state law for those violations because such claims are preempted, does not conflict with a decision of this Court or another Court of Appeals.

RULE 29.6 STATEMENT

Respondent Niles Bolton Associates, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioners Archstone Multifamily Series I Trust and Archstone (collectively "Archstone") own and develop multifamily housing projects. Archstone Pet. App. 3a. Respondent Niles Bolton Associates, Inc. is an architectural firm that, among other things, designs multi-family dwellings. *Id.* Niles Bolton entered into design agreements with Archstone to provide professional design services for a number of multi-family apartment buildings that are at issue in this case. *Id.* These apartment buildings are in Maryland, Virginia, North Carolina, Georgia,

Florida, and Tennessee. Archstone Pet. App. 18a-19a. In 2004, the Equal Rights Center and other advocacy groups filed an action against Archstone and Niles Bolton alleging violations of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* Archstone Pet. App. 3a. In June 2005, Archstone voluntarily entered into a settlement with the plaintiffs, which was incorporated into a Consent Decree. *Id.* at 17a. The Consent Decree provided that Archstone would (i) pay plaintiffs $1.4 million in damages, (ii) pay all attorneys' fees, costs and other expenses incurred by it and plaintiffs, and (iii) retrofit 71 properties to remedy alleged noncompliance with the FHA and ADA. Niles Bolton provided architectural design services for 15 of these 71 properties. *Id.* at 3a. Niles Bolton subsequently entered into a separate Consent Decree with the plaintiffs that resolved its first party liability under the ADA and FHA as between them, but did not include an admission of liability. *Id.*

After settling with the plaintiffs, Archstone filed a cross-claim against Niles Bolton. *Id.* This cross-claim asserted the following theories of recovery in separate counts: (1) contract indemnity; (2) implied indemnity; (3) breach of contract; and (4) professional negligence. *Id.* at 3a-4a.

Niles Bolton disputed the existence of the claimed violations at the 15 properties it designed that were covered by the Archstone Consent Decree and vigorously litigated the merits of the claims asserted in Archstone's cross-claim for more than three years until discovery closed. *Id.* at 5a, 19a-20a. Three weeks after the close of discovery, on October 24, 2008, Archstone filed a motion for leave to amend its

cross-claim to include a count for contribution. *Id.* at 6a. The parties each filed motions for summary judgment. *Id.* The District Court granted Niles Bolton's motion for summary judgment, dismissing the four counts described above on the grounds that they were preempted by federal law, as they impermissibly sought indemnification in contravention to Congress's purposes in enacting the ADA and FHA. *Id.* at 35a. The District Court also denied Archstone's motion for leave to amend to add a count for contribution because it held that the proposed amendment would prejudice Niles Bolton and that the amendment would be futile. *Id.* at 27a; 603 F. Supp. 2d 814 (D. Md. 2009).

Archstone appealed this final judgment to the United States Court of Appeals for the Fourth Circuit. Archstone Pet. App. 7a. The Fourth Circuit affirmed the District Court on April 19, 2010. 602 F.3d 597 (4th Cir. 2010). Archstone filed its Petition for a Writ of Certiorari (the "Petition") on July 19, 2010. Niles Bolton sought an extension of time in which to submit its Response to the Petition, through and including September 20, 2010. That request was granted by the Clerk of the Court on August 13, 2010.

REASONS FOR DENYING THE PETITION

Review by this Court is not warranted. First, Archstone has produced no compelling evidence of a conflict in the circuits in the way courts address state-law indemnity claims arising out of the ADA and FHA. Second, the Fourth Circuit's opinion is consistent with this Court's conflict preemption precedents. Finally, there are no compelling practical or policy concerns that would justify review on the merits.

A. A Circuit Split Does Not Exist

In its Petition for a Writ of Certiorari, Archstone argues that the Fourth Circuit's decision in this case exacerbates a split among the circuits "over the question whether a no-fault federal statutory scheme that contains no express preemption provision impliedly preempts state-law claims for indemnification." Archstone Pet. at 12. This is a faulty characterization of the Fourth Circuit's decision. It ignores the appropriate approach to conflict preemption analysis for the circumstances presented and fails to establish a basis under Supreme Court Rule 10 for granting the Petition. A close examination of the Fourth Circuit's holding in this case reveals a straightforward application of this Court's conflict preemption analysis. Archstone is an admitted violator of both the FHA and ADA who seeks to shift all of its liability for those statutory violations at properties where Respondent served as architect to Respondent via an indemnity claim. Such a state-law claim stands as an "obstacle to the accomplishment and execution" of the full purposes and objectives of Congress in the enactment of the Fair Housing Act and Americans with Disabilities Act. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 881-82 (2000) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Two facts critical to the Fourth Circuit's holding below are nearly ignored by Archstone. First, Archstone is a wrongdoer under the FHA and ADA. It entered into a consent decree admitting liability for violations of the FHA and ADA to the first-party plaintiff. Archstone Pet. 1 and App. 3a. Second, Archstone's cross-claim for indemnity seeks to recover all damages paid to the first-party plaintiffs and all costs of retrofitting the properties that Re-

spondent designed. Archstone Pet. App. 5a. Thus, Archstone seeks to recover from Respondent all of the damages it incurred pursuant to the Consent Decree it executed with the first-party plaintiffs, for all of the properties for which Respondent provided services as an architect. Archstone, the developer and owner of residential housing subject to the design and construction requirements of the FHA and ADA, seeks to transfer its cost of compliance with those statutes to Respondent, an architect who is independently subject to first party liability for any violations of the FHA and ADA to which it contributes. Archstone seeks to accomplish this transfer via the assertion of claims for indemnity, which, taken literally, means that Archstone wishes to divest itself of 100% of its potential liability for its own statutory violations, by assigning that liability to another party. The Fourth Circuit correctly concluded that Archstone could not do this, as the assertion of such state law claims would be antithetical to the purposes, policies and goals behind the enactment of those federal statutes. This is the very essence of conflict preemption.

As will be discussed in detail below, the Fourth Circuit's conflict preemption analysis was appropriately tailored to the circumstances presented by both the facts of this dispute and the particular federal statutes involved. In so doing, the Fourth Circuit adhered to this Court's precedents. Archstone's attempt to characterize the seemingly disparate treatment of a handful of selected cases dealing generally with preemption principles as a "circuit split" ignores the true basis for the different outcomes in those cases, and simultaneously fails to identify any flaw in the analysis undertaken by the Fourth Circuit below. Archstone has failed to satisfy

its burden under Supreme Court Rule 10, and its Petition should accordingly be denied.

1. Archstone Improperly Frames the Issue

The Fourth Circuit's conflict preemption analysis in this case focuses on whether the state-law claims asserted "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Archstone Pet. App. 8a. Fundamental to this analysis is whether the state-law claim "interferes with the methods by which the federal statute was designed to reach [its] goal." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992) (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). The Court's ultimate task is to determine whether the state-law claims are "consistent with the structure and purpose of the [particular] [federal] statute as a whole." *Id.* at 98. This is not a formulaic exercise but rather requires a court to examine the goals of the statute and whether the state-law claims are antithetical to those goals. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) ("there can be no one crystal clear distinctly marked formula" to determine whether a state-law claim is preempted). Archstone's framing of the issue as a conflict in the circuits regarding whether "no-fault" federal statutory schemes impliedly preempt state law claims for indemnification is the kind of formulaic abstraction this Court's precedent rejects. Proper conflict preemption analysis requires an examination of the specific goals of the federal legislation in question and the effect of the state law or claim on them. It is unsound to look to different holdings among an amorphous selection of proclaimed "no-fault" statutes and conclude that there is conflict in

the circuits. Specific inquiry does not serve Archstone's purpose in this case, so Archstone has created the appearance of conflict in an analytical framework that has never been accepted by this Court.

2. The Fourth Circuit Correctly Examined the ADA's and FHA's Goals and Purposes

Congress intended for the ADA and FHA's respective remedial schemes to be the exclusive source for redress of any wrong arising under or derivative to the statutes themselves. Numerous cases have evaluated the legislative history and other evidence of this intent in the context of assessing the viability of indemnification claims brought under, or derivative to, the FHA and ADA, with the conclusion that such claims are contrary to the expressed purposes and goals behind the enactment of those statutes. *See, e.g., United States v. Quality Built Constr., Inc.*, 309 F. Supp. 2d 767, 778-779 (E.D.N.C. 2003); *United States v. Gambone Bros. Dev. Co.,* No. 06-1386, 2008 WL4410093, *8 (E.D. Pa. September 25, 2008); *United States v. Shanrie Co., Inc.,* 610 F. Supp. 2d 958, 960-962 (S.D. Ill. 2009); *Mathis v. United Homes, LLC,* 607 F. Supp. 2d 411, 422-423 (E.D.N.Y. 2009).[1]

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[1] Some of the authority discussed in the above cited decisions examines Congressional intent in the context of attempts to pursue indemnity claims under the FHA and/or ADA, as opposed to the assertion of derivative claims under state law, as is at issue here. The distinction is one without a difference, however, as common sense indicates that evidence of the Congressional intent, and the expressed purposes of the statutes, is as applicable to the context of state law indemnification as to that involving the federal statutes themselves. Manifestly, much if not all of the analysis that appears in the few reported decisions addressing this issue is itself derivative of the analysis undertaken by this Court in its evaluation of an attempted

The Fourth Circuit's preemption analysis below was predicated upon and determined by those purposes and goals, and the intent of Congress in the enactment of each statute. Those purposes and goals are central to the validity of conflict preemption analysis. At the outset it is fundamental to recognize that Archstone does not argue that the federal courts are in conflict over the issue whether state-law indemnity claims are preempted when liability is premised solely on violations of the ADA or FHA. No such conflict exists.

A focus on statutory goals makes it a straightforward exercise to harmonize the cases Archstone contends are in conflict. Archstone cites *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992) as a case in agreement with the Fourth Circuit's decision in this instance. In *Martin*, the Tenth Circuit held that an employer's state-law indemnity action against employees based on violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, worked against the purpose of the FLSA and, therefore, was preempted. *Id.* at 1407-08.

This is not surprising given the purpose of the FLSA. As the *Martin* court noted: "Congress sought to foster an environment in which compliance with the substantive provisions of [the FLSA] would be

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claim for contribution for violations of the Civil Rights Acts in *Northwest Airlines v. Transp. Workers,* 451 U.S. 77 (1981), and revisited during the same Term in *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981). As astutely observed by the court in *Mathis*, in reference to that analysis, "[a]lthough this discussion is under the Civil Rights Act, there is no principled reason to distinguish it from the FHA and ADA anti-discrimination bent. Indeed, the Civil Rights Act also addresses discrimination." *Mathis,* 607 F. Supp. 2d at 429.

enhanced. Compliance with the FLSA will not be furthered if employees must defend against indemnity actions [by employers]." *Id.* at 1408 (internal quotation and citation omitted). The *Martin* court, therefore, adopted the Fourth and Fifth Circuit's reasoning to determine that an "employer who believed that any violation of the [FLSA's] provisions could be recovered from its employees would have a diminished incentive to comply with the statute . . . ." *Id.* at 1407 (quoting *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1264 (5th Cir. 1986)); *see also*, *Lyle v. Food Lion, Inc.*, 954 F.2d 984 (4th Cir. 1992).

Martin is consistent with the Fourth Circuit's holding here because the compliance goals of the FHA and ADA are similar to those of the FLSA, which contains a similarly broad regulatory scheme that includes exclusive remedies. Numerous other courts have considered the question presented here relative to the FLSA and have reached the same conclusion as *Martin*. In addition to the Tenth Circuit, the Second, Fourth and Fifth Circuits have found no state-law right of indemnification for employers held liable under the FLSA. *See Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007) ("Class Members' FLSA-based contract, negligence and fraud claims are precluded under a theory of obstacle preemption. Our conclusion is consistent with the rulings of several district courts deeming state claims to be preempted by the FLSA where those claims have merely duplicated FLSA claims."); *Herman v. RSR Security Servs. Ltd.,* 172 F.3d 132, 144 (2d Cir. 1999) ("even if the [Fair Labor Standards Act] does not authorize contribution or indemnification, appellant declares that these claims may nonetheless be prosecuted under New York law. This view of the law is flawed

because the FLSA's remedial scheme is sufficiently comprehensive as to preempt state law in this respect."); *Lyle v. Food Lion, Inc.,* 954 F.2d 984, 987 (4th Cir. 1992) ("In effect, Food Lion sought to indemnify itself against Tew for its own violations of the FLSA, which the district court found, and we agree, is something FLSA simply will not allow."); *LeCompte v. Chrysler Credit Corp.,* 780 F.2d 1260, 1264 (5th Cir. 1986) ("To engraft an indemnity action upon this otherwise comprehensive federal statute would run afoul of the Supremacy Clause of the Constitution[] and would undermine employers' incentives to abide by the Act . . . .").

It is noteworthy that the Circuit Courts' rejection of state-law indemnity claims arising under the FLSA does not turn on a characterization of that statute as "no-fault," as Archstone would have this Court believe. Instead, these holdings rise from the foundation that the FLSA encompasses a comprehensive regulatory scheme, including remedies for violations of its mandate, which Congress intended to be exclusive, just like the ADA and FHA. A developer, or other responsible party, who has violated the FHA and/or ADA but can shift that liability to others will have a similarly diminished incentive to comply.

3. The Potential Indemnitee's Conduct Is Part of the Court's Evaluation of Whether State-law Claims Conflict with Statutory Goals

One of the cases Archstone cites as "in conflict" with the Fourth Circuit's holding in this case actually analyzes conflict preemption in exactly the same way. It reaches a different result simply because the salient facts are dissimilar. In *Delay v. Rosenthal Collins Group, LLC*, 585 F.3d 1003 (6th Cir. 2009),

the Court held that a claim for indemnity asserted by a manager of a commodities trading branch office against his former employer was not preempted by the Commodities Exchange Act ("CEA"), 7 U.S.C. § 1, *et seq.* 585 F.3d at 1006-07. In *Delay*, the manager was fired from his job. *Id.* at 1004. A short time later, the Commodity Futures Trading Commission ("CFTC") filed suit against him. *Id.* The manager prevailed and sought indemnification under Ohio law from his former employer for his legal fees and expenses in connection with the CFTC action. *Id.* The commodities trading firm argued that the CEA preempted its former manager's claim for indemnification, and the district court dismissed the indemnification claim on that basis. *Id.*

The Sixth Circuit reversed because the former manager was not a wrongdoer under the CEA. *Id.* at 1006. It held that "Congress did not intend to displace the state-law indemnification rights, if any, of parties found *not* to have violated the CEA." *Id.*

In so holding, the court in *Delay* recognized a series of cases from the Second, Third, Fourth, and Ninth Circuits in which state law claims for indemnification by violators of federal securities laws were preempted because "'[a] securities wrongdoer should not be permitted to escape loss by shifting his entire responsibility to another party.'" *Id.*, citing *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989).

The "wrongdoer" determination is critical to the *Delay* court's analysis and allows it to distinguish *Baker, Watts*. *Id.* at 1006-07. The *Delay* court expressly limits its holding to the issue of whether an innocent defendant is entitled to indemnity. *Id.* at 1007. The problem for Archstone here is that it is not

an innocent defendant. It is instead an admitted violator of the ADA and FHA. Archstone Pet. i.

The Fourth Circuit in this case followed *Baker, Watts*, because, unlike the former manager in *Delay,* Archstone is a wrongdoer. It has admitted liability under the ADA and FHA, as it acknowledges in the very first sentence of the Question Presented in its Petition for a Writ of Certiorari. Niles Bolton has not been adjudged liable under the ADA and FHA, so Archstone's assertion that Niles Bolton directly caused Archstone's violations has no support in the record. Archstone has consistently ignored this crucial distinction throughout this litigation and continues to do so here. There is ample authority for the proposition that a party that has violated a federal statute may not shift all of its liability to another by virtue of state law indemnity. *Eichenholtz v. Brennan,* 52 F.3d 478, 483-85 (3d Cir. 1995); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1232 (9th Cir. 1989); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288-89 (2d Cir. 1969). *Lyle v. Food Lion*, 954 F.2d 984, 987 (4th Cir. 1992) is similar to the *Delay* case, except for the most important detail: the party seeking indemnity under state law is innocent in *Delay* and a violator of the Fair Labor Standards Act in *Lyle*. This distinction makes all the difference in the result because allowing a violator of a federal statute to shift all of its liability to another party is an obstacle to the federal statute's purpose, as it removes the risk associated with violating the statute and diminishes an otherwise strong incentive to comply.

4. The Copyright Act and Patent Act Cases Have Different Statutory Goals and Purposes That Lead to Different Preemption Results

The other cases cited by Archstone as being in conflict with the Fourth Circuit's decision here concern statutes with much different goals than the FHA and ADA. In *Foley v. Luster*, 249 F.3d 1281 (11th Cir. 2001), a group of recording companies sued high level distributors of Amway products and their videographer for copyright infringement. The distributors settled with the plaintiffs and cross-claimed against the videographer for indemnification. *Id.* at 1284-1285. The cross-claim went to trial, and the jury found the videographer liable for a share of the settlement sum and for fees incurred by some, but not all, of the distributors. The district court denied the videographer's post-trial motion to dismiss on the ground of preemption. The Eleventh Circuit affirmed the denial, holding that conflict preemption did not bar the cross-claim because "a suit for indemnity is not an obstacle to congressional intent, which was to protect copyright holders in a comprehensive and uniform way." *Id.* at 1287.

Archstone argues that *Foley* is in "square conflict with the decision below" because "[a]n action for indemnity concerning a violation . . ." and FHA obviously would not 'intrude upon' the duties under those laws . . . because, like the Copyright Act, neither contains a fault element with which indemnification might conflict." Archstone Pet. at 18-19. Archstone's argument ignores the purpose of the ADA and FHA and assumes the Copyright Act's goals are the same. "The purpose of Congress is the ultimate touchstone of preemption." *Foley,* 249 F.3d at

1287. The result in *Foley* is wholly inapplicable to the decision below because the stark differences between the Copyright Act and the disability anti-discrimination laws.

The goals of the copyright law are to stimulate the creation and publication of edifying matter by enabling creators to earn a living, either by selling or by licensing others to sell copies of the copyrighted work. *On Davis v. The Gap, Inc.,* 246 F.3d 152 (2d Cir. 2001), as amended, (May 15, 2001); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The state law indemnity action did not "*concern the rights of a copyright holder.*" *Foley*, 249 F.3d at 1286 (emphasis in original). Thus, the indemnification claims did not affect the central scope of the Copyright Act: protection of those exclusive rights. The ADA and FHA, on the other hand, aim to address the serious and pervasive social problem of discrimination against the disabled. In addition to protecting persons who have a right to sue under the ADA and FHA, Congress also focused on compliance by developers, contractors, architects and others, thereby preventing discriminatory conduct. This is much more akin to the statutory scheme discussed in *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992) and the other FLSA cases discussed above. Any attempt by a violator of the statutes to shift its compliance costs to another party weakens the incentive to comply and is an obstacle to the statutes' goals.

Archstone's reliance on *Cover v. Hydramatic Packing Co., Inc.*, 83 F.3d 1390 (Fed. Cir. 1996) suffers from the same analytical infirmity. In *Cover*, the holder of a patent for lighting fixture system with a "batt of thermal insulation to protect wiring from

heat produced by a bulb" granted an exclusive license to commercialize his invention. 83 F.3d at 1391. The licensee in turn sold some of the patented insulation to a fixture manufacturer but did not mark the insulation units with the patent number, as required by the Patent Act. *Id.* at 1391-92. The fixture manufacturer sent drawings and specifications to a second manufacturer to manufacture more of the insulation. *Id.* at 1392. The patent holder sent a cease and desist letter to the second manufacturer, sued it for contributory infringement and sued the first manufacturer for direct infringement of his patent. *Id.* The second manufacturer cross-claimed against the first, claiming indemnity for improperly marked goods under Pennsylvania's Uniform Commercial Code ("UCC"). *Id.*

The patent holder settled with the first manufacturer. The district court dismissed the cross-claim holding that the Patent Act preempted the second manufacturer's state-law claim because state law could not impose liability for conduct that was expressly not actionable under federal law. *Id.* at 1392.

The Federal Circuit reversed the holding that the indemnity claim under the UCC was preempted by federal law because "the patentee and the patent code are no longer in the picture" due to the settlement. *Id.* All that remains, the court stated, was a "legal relationship . . . defined and governed by section 2-312(c) of the UCC, which has nothing to do with liability of manufacturers under the patent laws." *Id.* at 1394.

Again, this statutory scheme is completely different from the FHA and ADA. The three purposes of the patent statutes are: (1) to foster and reward inven-

tion, (2) to stimulate further innovation, and (3) to ensure free use of ideas in the public domain. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979). This is similar to Congress's objectives for enacting the Copyright Act. The purpose of the statute is to protect the patent holder's exclusive right. By contrast, the FHA and ADA both protect the rights of disabled persons and ensure compliance by developers, contractors and others with the provisions designed to protect those rights. Allowing Archstone or others subject to first party liability to avoid the cost of compliance via the assertion of indemnity claims against each other diminishes the incentive to comply with these comprehensive statutes.

Finally, Archstone's inclusion of *Engvall v. Soo Line Railroad Co.*, 632 N.W. 2d 560 (Minn. 2001) is another effort to create conflict where none exists. In *Engvall*, an injured railroad employee sued his employer under the Federal Employers' Liability Act ("FELA") after an injury at work. The railroad sued the manufacturer of the locomotive for indemnity alleging negligent design of the handbrake that caused the employee's injuries. The Minnesota Supreme Court reversed a grant of summary judgment in favor of the manufacturer holding that the Locomotive Inspections Act ("LIA") does not preempt state common law negligence actions based on a violation of the LIA. 632 N.W. 2d at 570-571. The court held that a negligence claim based on a violation of LIA would not have any direct or substantial effect on the field of locomotive design, construction and material and therefore was not subject to preemption.

This case is unpersuasive for at least two reasons. First, *Engvall* deals with field preemption, and while Archstone asserts that *Engvall*'s reasoning is perfectly applicable to conflict analysis, this distinction alone renders the case inapposite. Second, other federal courts disagree that the case was correctly decided. *See Roth v. I & M Rail Link, LLC,* 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (rejecting *Engvall*); *Bonner v. Union Pac. R.R.*, No. CV03-134-S-MHW, 2005 WL 1593635, *9 (D. Idaho July 6, 2005) (rejecting *Engvall); Mehl v. Canadian Pac. Ry.,* 417 F. Supp. 2d 1104, 1115 (D.N.D. 2006) (rejecting *Engvall*). There is no conflict among federal circuits on this issue.

Whether a statute may be characterized as "no-fault" is irrelevant to the question of preemption. Neither the ADA and FHA nor federal common law permit indemnity, and provision of such a remedy under state law would impede Congress's objective of promoting compliance by those developing, designing, and constructing properties subject to these statutes, as the Fourth Circuit held here. For these particular statutes, the line for preemption purposes is, and should be, drawn at liability. ADA and FHA compliance goals would be severely impeded if one who has admitted liability for violations could "shift its entire responsibility for federal violations on the basis of a collateral state action for indemnification." *Baker, Watts*, 876 F.2d at 1108. This theme resonates in the analysis of all statutes in which Congress has emphasized compliance by those who are not protected parties under the statute in question. Archstone is not a protected party under the ADA or FHA, it is an admitted violator of those statutes. There is simply no conflict in the circuits concerning the viability of claims for indemnity as-

serted by a party that has violated these federal statutes, or others with similar policies, purposes and compliance goals. Archstone has not presented a compelling reason for this Court to grant its Petition.

B. The Ruling Below Correctly Applies This Court's Preemption Precedents

Archstone also contends that a review is appropriate because the holding below is at odds with this Court's recent preemption cases, in particular *Wyeth v. Levine,* 129 S.Ct. 1187 (2009) and, in any event, because the "regulatory purposes of the FHA and the ADA would [not] be undermined by allowing a claim for indemnity." Archstone Pet. at 26. Archstone is incorrect. The presumption against finding federal preemption of state law does not inform the analysis in this case, which involves a field long regulated by the federal government. Accordingly, the holding below is consistent with this Court's recent preemption precedents, including *Wyeth.* Archstone's second argument is without merit because permitting a violator of the ADA and the FHA to shift its compliance costs would obstruct the goals of these anti-discrimination statutes.

1. The Presumption Against Preemption Does Not Apply

Archstone suggests that all preemption analysis should begin with a presumption against preemption, and that the holding below is defective because the court "did not even mention the presumption against preemption." Archstone Pet. at 25-26. This argument misses the mark as it assumes, without basis, that the presumption applies in this case. "When addressing questions of express or implied preemption," this Court begins with the "assumption

that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). No presumption against preemption applies, however, "when [a] State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). In fact, the opposite is true. *Id.* That is precisely the case here.

"In determining whether a state statute is preempted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress." *California Federal Sav. and Loan Ass'n v. Guerra,* 479 U.S. 272, 280 (1986). The primary purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)-(b)(2). The Congress intended the federal government to play the central role in enforcing the standards with the "sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(3)-(b)(4). The purpose of the FHA is to promote fair housing throughout the United States, including the provision of accessible, "fair" housing for the disabled. 42 U.S.C. § 3601. Part and parcel of this policy is to provide the public with protection against defined discriminatory practices in the development, design, and construction of properties subject to the Act. 42 U.S.C. § 3602(f).

Since the passage of the ADA and the FHA, the federal government has played what is tantamount to an exclusive role in the creation and enforcement of these standards to remedy what this Court has recognized as one of America's "shameful oversights," which causes individuals with disabilities "to live among society shunted aside, hidden, and ignored." *Alexander v. Choate,* 469 U.S. 287, 296 (1985) (internal citation and quotations omitted). The presumption against federal preemption has no part in this case because the ADA and the FHA constitute fields of regulation that not only have been substantially occupied by federal authority for an extended period of time, but also were created due to the absence of any comprehensive, effective regulation by the various states.

Nevertheless, Archstone relies on *Wyeth* for the proposition that preemption is inappropriate because "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." Archstone Pet. at 35 (quoting *Wyeth v. Levine,* 129 S. Ct. 1187, 1200 (2009)). This argument cannot withstand scrutiny.

In *Wyeth,* the Supreme Court analyzed the preamble to a Food and Drug Administration (FDA) regulation which proclaimed to preempt any contrary state law. 129 S. Ct. at 1200. The Court declined to defer to this conclusory statement in the preamble. *Id.* at 1201. The Court's independent evaluation determined that congressional intent pointed away from preemption. *Id.* at 1201-03. The Court declined to preempt a state-law tort claim because the federal regulation at issue provided only a safety "floor" for

warning labels for drug manufacturers. Because the FDA did not prohibit manufacturers from adding further warnings to the label, the state-law did not stand as an obstacle to accomplishment of Congress's purposes, but rather, went beyond the FDA in furtherance of those very principles. *Id.* at 1204.

Again, this statutory scheme is very different. To suggest that a state-law indemnity action that allows a statutory violator to shift its compliance costs to other parties furthers the goals of the ADA and FHA is questionable logic at best. Nothing about such an action enhances the protection of disabled individuals from discrimination, or discourages a would-be violator from engaging in discrimination. *Wyeth* also is distinguishable because it deals with regulations involving health and safety – two areas where states have historically played a significant role. *See Gonzalez v. Oregon*, 546 U.S. 243, 271 (2006) ("regulation of health and safety is primarily, and historically, a matter of local concern") (internal citation and quotations omitted). This case, by contrast, involves enforcement of federal laws designed to protect individuals with disabilities – historically a federal occupation. The presumption against preemption is inapplicable here because Congress legislated in a field *not* traditionally occupied by the states.

Further, *Wyeth* involves a situation where state law offers protections greater than those provided by federal law. Such state-law claims are less likely to run afoul of an obstacle preemption analysis because such laws actually further, not impede, Congress's objectives. This is not such a case. Allowing state-law indemnification claims between parties who are both subject to first party liability under the FHA and ADA runs contrary to, rather than in furtherance

of, Congress's expressed purposes regarding the non-delegable duties imposed by those statutes. The court below found that allowing Archstone to eliminate its potential for liability under either statute via the use of indemnification would diminish its incentive to comply with the statutes, thus impeding the goals of the ADA and the FHA. Archstone Pet. App. 10a. This case does not involve a parallel state law that furthers the goals of the federal statute at issue, as in *Wyeth*. Instead, the question here is whether a party that has admittedly violated its non-delegable duties under the ADA and FHA, and incurred resulting compliance costs, may shift those costs to another party through state-law indemnity. This Court should reject Archstone's attempt to distill from *Wyeth* a broad anti-preemption principle that has no bearing here.

Archstone's criticism of the Fourth Circuit's reliance on *Abbott v. Am. Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988) in support of the principle that "[p]reemption under an obstacle preemption theory is more an exercise of policy choices by a court than strict statutory construction" is unfounded. Under the circumstances presented, nothing about that statement is in conflict with this Court's conflict preemption case law. Implied conflict preemption, at issue in this case, ultimately turns on the meaning of the Supremacy Clause. *See Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984) (state laws that conflict with federal law are preempted "by direct operation of the Supremacy Clause"). That constitutional provision employs broad language that favors preemption – that "the laws of the United States . . . shall be the supreme law of the land . . . any Thing in the

Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

In light of this broad constitutional mandate, courts must engage in "an exercise of policy choices" *Abbott,* 844 F.2d at 1113, to strike the appropriate balance between competing laws. In accordance with applicable precedent, the Fourth Circuit's analysis below was governed by the nature of the federal statutes at issue and their goals and policies. Importantly, the policy choices at issue here are those made by Congress, as explicitly stated in the legislative history and other sources set forth in authorities cited above. Thus, the only exercise conducted here was the determination of Congressional intent behind the enactments of the FHA and ADA, a completely proper undertaking

2. The Presumption, Even If Applicable, Is Sufficiently Overcome

Where compliance with both federal and state law is possible, state law is still preempted if application of state law would frustrate the purpose of the federal law. *See Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.,* 168 F.3d 1362, 1369 (D.C. Cir. 1999) (holding that state-law claims would frustrate federal policy under the Higher Education Act and stand as an obstacle to Congressional purposes and objectives). Here, all of Archstone's claims derive from alleged ADA and FHA violations. To allow indemnification claims based upon those violations to proceed, when the comprehensive remedial schemes of both the FHA and ADA prescribe exclusive remedies and plainly do not contemplate such claims between co-defendants, would itself frustrate the goals of these Acts.

The court in *Access4All, Inc. v. Trump Int'l Hotel & Tower Condo.*, No. 04-CV-7497, 2007 WL 633951, at *24 (S.D.N.Y. Feb. 26, 2007) addressed this issue in the context of the ADA: "Additionally, even if Plaintiff had authority that such a right might exist in New York common law, it would raise the specter that any state-law right to indemnity would be preempted by the extensive remedial scheme of the ADA." With respect to the FHA, the courts in *Mathis v. United Homes, LLC,* 607 F. Supp. 2d 411 (E.D.N.Y. 2009) and *United States v. Murphy Development, LLC*, No. 3:08-0960, 2009 WL 3614829 (M.D. Tenn. Oct. 27, 2009) reached similar conclusions. "Congress, in discussing the need for enhancing remedies to combat discrimination in housing, determined that enforcement should be bolstered by giving HUD new powers, not by permitting co-defendants to sue each other for contribution [and/or indemnity]." *Mathis,* 607 F. Supp. 2d at 422. "Third-Party Plaintiffs' state law claims for express or implied indemnity and/or contribution will also be dismissed with prejudice because they are de facto claims for indemnity and contribution that are preempted by federal law. Such derivative indemnity and contribution claims are barred because allowing recovery under state law for indemnity and/or contribution would frustrate the achievement of Congress' purposes in adopting the FHA and the ADA." *Murphy*, 2009 WL 3614829 at *2.

3. Archstone's Indemnity Claims Are Incompatible With the Goals of the ADA and the FHA.

Archstone argues that state-law indemnity claims are compatible with statutory goals and that the Fourth Circuit misinterpreted the scope of Archstone's

"non-delegable duty to comply with the ADA and [the] FHA." Archstone Pet. at 26. Archstone relies on two cases to support its contention that the statutory non-delegable duty does not preclude it from asserting an indemnity action. The first, *Meyer v. Holly,* 537 U.S. 280 (2003), has no real application to the issues before this Court. In *Meyer,* the Supreme Court held that a corporation's principal shareholder could not be held liable under the FHA for discriminatory acts of another employee, which were attributable to the corporation because they were committed in the course of his employment for the corporation. Archstone uses this case to argue that its liability under the FHA is "vicarious." Archstone, who is an experienced, successful developer and owner of multi-family properties subject to the FHA and ADA, has raised this argument unsuccessfully at each level of this proceeding. In so doing, Archstone has unfortunately made it very clear that it does not accept direct responsibility for compliance with these statutes.

Rather, and only begrudgingly, Archstone acknowledges only "vicarious" liability for violations of the FHA and ADA at the properties it develops, owns and offers to the public. Archstone argues in effect that any liability attaching to it arises not as a result of the unique role it plays as the developer and owner of residential housing properties marketed to the general public, but solely by virtue of the fact that it hired other, "more culpable" parties to design, build and possibly manage its properties. Implicit in this argument is Archstone's belief that only architects, contractors and managers need concern themselves with understanding the intricacies of accessible design and construction that are a prerequisite for compliance with the FHA and ADA. This position is

simply wrong and runs counter to the Congressional purposes behind the enactment of both statutes. Archstone's liability under these Acts is express and direct – not derivative, technical, or based on agency principles.

In this vein, Archstone's complaint that the owners of apartment projects are merely "expedient" targets for plaintiffs seeking to raise issues of non-compliance with the requirements of the FHA and/or ADA rings hollow. Archstone Pet. at 27. The entity with the greatest control of the construction process – indeed the entity with ownership of both the final product and the very idea itself – is the developer/owner. The entity in the "best position to prevent" statutory violations is surely the one with absolute authority over all decisions related to the project - the developer/owner.

The second case, *Ellison v. Shell Oil Co.*, 882 F.2d 349 (9th Cir. 1989) does nothing to help the cause of Archstone's Petition. First, *Ellison* deals with "partial indemnity," which is another way of saying contribution. Archstone did not bring a claim for contribution against Niles Bolton, and the Fourth Circuit's opinion below did not address the viability of a claim for contribution asserted by one who has admittedly violated the ADA and FHA. Second, there is no discussion of preemption in *Ellison*, presumably because it was not raised. Archstone's citation to *Ellison* in support of its claim that the Fourth Circuit incorrectly performed its preemption analysis is therefore misplaced.

Finally, Archstone's argument that indemnity claims actually further rather than undermine the purpose of the ADA and the FHA, because "Congress could not have intended to allow an architect who

caused statutory violations to walk away," disregards the obvious. Architects are charged with a non-delegable duty to comply with the requirements of those statutes and remain liable to putative plaintiffs for any violations to which they contribute. Archstone Pet. at 28; *See Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.,* 3 F. Supp. 2d 661, 664-65 (D. Md. 1998) (architects and builders, as well as owners, have direct liability under the FHA). Archstone surprisingly cites to *Baltimore Neighborhoods* in support of the proposition that allowing an owner to sue an architect for indemnity would prevent an architect from avoiding liability under the FHA, which "would obstruct the purposes of the FHA." Archstone Pet. at 28.

Archstone's reliance on *Baltimore Neighborhoods* is misguided, however, because the seminal point is simply that an architect, like any other party to the design and construction process, may be subject to first party liability under the FHA for any violation to which he contributes. 3 F. Supp. 2d. at 665. ("By this, the Court does not suggest that all participants are jointly and severally liable for the wrongful actions of others regardless of their participation in the wrongdoing, but rather, that those who are wrongful participants are subject to liability . . . ."); *see also, United States v. Shanrie Co., Inc.*, No. 05-306-DRH, 2007 WL 980418, at *7 (S.D. Ill. March 30, 2007). It does not in any way hold or suggest that an architect can or should be liable to indemnify another party who is equally subject to first party liability. As a practical matter, Archstone's settlement with the original plaintiffs here did not end Respondent's exposure to liability to the first-party plaintiffs. That exposure continued until Respondent's Consent Decree with the first-party plaintiffs, executed in

March 2007, after more than two years of litigation. Fundamentally, Archstone's "public policy" argument loses sight of the fact that developer/owners are not just the "most expedient" targets for suits alleging non-compliance, but also often the most deserving.

C. Archstone's Bases For Its Claim of "Substantial Practical Importance" Do Not Justify Review

Archstone repeats its contention that architects may "go free" and unpunished for FHA and ADA violations if the Fourth Circuit's decision below is left undisturbed, but relies primarily upon 28 C.F.R. § 36.201(b) as the basis of its final ground for review by this Court. Archstone cites to this regulation as support for its argument that indemnity for violations of the ADA is not only not antithetical to the purposes of the ADA, but is "uncontroversial." Archstone Pet. at 30. 28 C.F.R. § 36.201(b) is an idiosyncratic regulation promulgated by the Department of Justice that is limited to the peculiar circumstances of the landlord tenant relationship and the statutory framework of the ADA. Archstone cites to this regulation as support for its broad proposition that, significant authority and legislative history to the contrary, state-law indemnification rights exist for all those who violate the ADA. As with Archstone's other arguments, even cursory analysis reveals this to be an untenable position.

Section 36.201(b) does allow an owner of a public accommodation and its tenant to allocate responsibility for compliance with the obligations of the ADA between themselves, by lease or other contract. However, the legislative history of the ADA confirms that no covered entity may use a "contractual provision to reduce any of its obligations under [the] Act."

Botosan v. Paul McNally Realty, 216 F.3d 827, 833 (9th Cir. 2000). The analysis undertaken in *Botosan* is instructive, because the court begins its discussion by firmly stating that "[o]wners of public accommodations should not be permitted to contract away liability." *Botosan*, 216 F.3d at 834. That is precisely what Archstone is asking this Court to sanction here. The court continues:

> In the proposed version of 28 C.F.R. § 36.201, the DOJ allocated responsibility for providing auxiliary aids and services solely to the tenant. *See* 28 C.F.R. ch. I, pt. 36, app. B., at 594. Groups representing persons with disabilities objected to the proposed rule because, in their view, it permitted a landlord to circumvent the ADA by leasing to smaller entities for which ADA compliance would not be "readily achievable." In response, the DOJ eliminated the provisions listing specific allocations to specific parties in the final rule, and instead, permitted the parties to allocate responsibility.

Id.

The "readily achievable" issue is significant. An economic feasibility defense to ADA compliance is valid because the term "readily achievable" takes into account the financial profile of the covered entity in assessing whether the removal of barriers required for compliance is possible. *See* 42 U.S.C. § 12181(9). Public interest groups feared that landlords would escape their ADA liability altogether by leasing solely to "smaller" tenants, who could then object to compliance with the ADA's requirements on the basis that the work required to comply was not "readily achievable" due to financial constraints. Under the proposed version of the regulation, which placed

responsibility on the tenant alone, a lease arrangement with tenants for whom compliance was not financially achievable would leave a plaintiff with no genuine recourse against either the tenant or the landlord. To prevent this outcome, in the final version of 28 C.F.R. § 36.201, the DOJ allowed the landlord and tenant to allocate responsibility for ADA compliance in their lease.

The resulting bargain is this: The legislative history outlawing the use of a contractual provision to reduce obligation under the Act is satisfied because both the tenant and the landlord remain exposed to liability. This interpretation furthers the ADA's purpose because "[n]ot only does this construction of the regulation hamper efforts of a landlord and a tenant to evade ADA requirements, but it also aids in the enforcement of the Act. A landlord who is aware of its liability for any ADA violations found on its premises has a strong incentive to monitor compliance on its property." *Id.* As the regulation is interpreted by the DOJ, "landlord is a necessary party in an ADA action, regardless of what the lease provides. The landlord can in turn seek indemnification from the tenant pursuant to their lease agreement." *Id.* Most importantly, the potential for a situation in which no party would be responsible for compliance with the ADA was removed.

In making this compromise the DOJ can hardly be said to have "necessarily concluded that indemnity between defendants is not antithetical to the purposes of the ADA," as Archstone unabashedly states. Archstone Pet. 30. The regulation is narrowly designed, intended and interpreted to reflect the economic realities of the landlord and tenant relationship, and to maximize, not minimize, compliance

with the ADA. It has no application, explicitly or implicitly, to owners and architects, as the Fourth Circuit recognized. Archstone Pet. App. 10a. Archstone, as the owner/developer, and Niles Bolton, as the architect, are bound to comply with the requirements of the ADA and FHA in the design and construction of covered housing units, and each may be sued by any aggrieved persons for failures to meet those requirements.

CONCLUSION

Archstone has not presented any compelling reasons for this Court to grant its Petition. Respondent respectfully requests that it be denied.

Respectfully submitted,

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