No. 09-1273

In the Supreme Court of the United States

ASTRA USA, INC., ET AL., PETITIONERS

v.

COUNTY OF SANTA CLARA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the Nation's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, it

files briefs as amicus curiae in cases that raise issues of vital concern to the Nation's business community.[1]

This case presents a simple question of exceptional importance to the Chamber's members: *viz.*, whether a private plaintiff may sue as a third-party beneficiary of a government contract that incorporates the requirements of a federal statute where the statute itself does not confer a private right of action. In the decision below, the Ninth Circuit deepened an already substantial circuit conflict by holding that a private plaintiff may be able to sue as a third-party beneficiary in such circumstances. And it went further than any other circuit had previously gone by holding that the plaintiff here was actually entitled to sue on a third-party beneficiary theory.

The Ninth Circuit's decision directly implicates the interests of the Chamber's members. Millions of American businesses annually enter into contracts with the federal government in a wide range of industries including construction, manufacturing, transportation, and utilities. Those contracts routinely require contracting parties to comply with statutory or regulatory requirements as a condition of doing business with the government. Until the decision below, no court of appeals had permitted a private plaintiff to bring suit to enforce

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[1] Pursuant to Rule 37.6, the Chamber affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than the Chamber, its members, or its counsel made such a monetary contribution. Pursuant to Rule 37.2, counsel of record received timely notice of the Chamber's intent to file this brief at least ten days before the due date. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office. Counsel for the Chamber represents some of the petitioners on unrelated matters.

those requirements as a third-party beneficiary of the contract where, as is frequently the case, the plaintiff had no statutory right of action.

The practical consequences of the Ninth Circuit's decision are sweeping. If that decision is allowed to stand, companies that do business with the government will be exposed to burdensome and expensive litigation, with the possibility of significant liability and the unjustified disclosure of confidential information. The decision below will disrupt the settled expectations not only of the private sector, but also of numerous government departments and agencies that depend on the private sector to provide goods and services in a cost-effective manner—including, as in this case, goods and services that are vital to promoting the public welfare. And the decision below threatens to create a disincentive for businesses to enter into government contracts in the future—an outcome that would disserve the interests of millions of Americans whose lives are improved through public-private partnerships embodied in government contracts such as those at issue here. For the reasons stated in this brief, the Chamber respectfully urges the Court to grant review.

SUMMARY OF ARGUMENT

Further review is warranted in this case for three principal reasons.

First, the Ninth Circuit's decision deepens a long-standing circuit conflict on whether a private plaintiff may sue as a third-party beneficiary of a government contract that incorporates requirements of a federal statute where the statute itself does not confer a private right of action. Six courts of appeals (including the Ninth Circuit in the decision below) have now held that a third-party beneficiary may be able to sue in such cir-

cumstances, and three courts of appeals have held to the contrary. Despite the Ninth Circuit's best efforts, those decisions cannot be reconciled, and the resulting conflict warrants this Court's intervention.

Second, the Ninth Circuit's decision is patently erroneous. In permitting a private plaintiff to bring suit under the guise of federal common law in order to enforce a federal statutory requirement, the Ninth Circuit flouted this Court's repeated admonitions concerning the limitations on the invocation of federal common law and on the recognition of implied rights of action. Under a proper reading of the Court's decisions, the absence of a private right of action to enforce the statutory requirements at issue should foreclose efforts to enforce those requirements through other means. This Court should grant certiorari in order to bring the Ninth Circuit's aberrant mode of analysis in line with the Court's earlier decisions.

Third, the Ninth Circuit's decision is extraordinarily harmful to American businesses, both in the immediate context and in many others. By using federal common law to permit a private party to bring suit, the decision below threatens to expose businesses to liability that neither they nor the federal government envisioned in entering into contractual arrangements implementing statutory requirements. And it would wreak havoc on statutory schemes (like the one at issue here) that by their terms contemplate the possibility only of government, and not of private, enforcement. The dramatic consequences of the Ninth Circuit's decision confirm the need for this Court's review.

ARGUMENT

A. The Decision Below Deepens A Circuit Conflict Concerning The Availability Of A Private Right Of Action Under Federal Common Law In The Absence Of A Statutory Right

1. As the petition explains (at 13-21), even before the Ninth Circuit's decision, the courts of appeals were intractably split on the question whether a private plaintiff may sue as a third-party beneficiary of a government contract that incorporates requirements of a federal statute where the statute itself does not confer a private right of action. On the one hand, three courts of appeals had held that a private plaintiff could never sue in those circumstances. See *Grochowski* v. *Phoenix Construction*, 318 F.3d 80, 86 (2d Cir. 2003); *Hoopes* v. *Equifax, Inc.*, 611 F.2d 134, 135 (6th Cir. 1979); *Hodges* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 728 F.2d 414, 416 (10th Cir. 1984). Most notably, in *Grochowski*, the Second Circuit considered third-party beneficiary claims brought by private plaintiffs on the ground that the defendants had violated the minimum-wage requirements of the Davis-Bacon Act (DBA), 40 U.S.C. 3141 *et seq.* See 318 F.3d at 83-84. The court refused to permit the claims to proceed. See *id.* at 84-86. The court reasoned that the DBA did not confer a private right of action, *id.* at 85; that the plaintiffs' third-party beneficiary claims constituted "indirect attempts at privately enforcing the prevailing wage schedules contained in the DBA," *id.* at 86; and that the claims were thus "clearly an impermissible 'end run' around the DBA," *ibid.*[2]

[2] Numerous district courts in other circuits had reached the same conclusion. See, *e.g.*, *Rogers* v. *United States Army*, No. 06-1389, 2007 WL 1217964, at *11-*12 (S.D. Tex. Apr. 23, 2007); *Brug* v. *Na-*

On the other hand, five courts of appeals had held that a private plaintiff could sue even in the absence of a statutory right of action. See *Falzarano* v. *United States*, 607 F.2d 506, 509-511 (1st Cir. 1979); *Nguyen* v. *United States Catholic Conference*, 719 F.2d 52, 55-56 (3d Cir. 1983) (per curiam); *Perry* v. *Housing Authority*, 664 F.2d 1210, 1217-1218 (4th Cir. 1981); *D'Amato* v. *Wisconsin Gas Co.*, 760 F.2d 1474, 1477-1478 & n.3 (7th Cir. 1985); *Dewakuku* v. *Martinez*, 271 F.3d 1031, 1040 (Fed. Cir. 2001). Critically, none of those courts determined that the plaintiff at issue was actually *entitled* to sue; instead, they merely recognized the possibility that a plaintiff *could* sue on a third-party beneficiary theory in some circumstances. That is not surprising, because, as Judge Weinstein observed, "the same considerations largely determine" whether "[a] plaintiff may sue as a third-party beneficiary of the contract mandated by [a] statute" as whether "the plaintiff has [an implied] right of action under the statute." *Davis* v. *United Air Lines, Inc.*, 575 F. Supp. 677, 680 (E.D.N.Y. 1983); accord, *e.g.*, *Price* v. *Pierce*, 823 F.2d 1114, 1120 (7th Cir. 1987) (Posner, J.).

2. The Ninth Circuit's decision in this case deepens the preexisting circuit conflict. See, *e.g.*, Pet. App. 11a. Indeed, it goes even further than the other circuits that had previously held that a plaintiff could sue on a third-party beneficiary theory, by holding that respondent in this case was actually entitled to sue (on the theory that it and other covered entities were in fact intended beneficiaries of the contracts at issue). See *id.* at 11a-16a.

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tional Coalition for the Homeless, 45 F. Supp. 2d 33, 41 (D.D.C. 1999); *Robinson* v. *Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1532 (M.D. Fla. 1991).

The Ninth Circuit's decision therefore appears to be the first by a court of appeals to permit a private plaintiff to bring suit to enforce statutory requirements as a third-party beneficiary of a contract in the absence of a statutory right of action.

Even in the absence of a circuit conflict, that extraordinary outcome would warrant this Court's intervention. But there can be no doubt that a circuit conflict exists, as the Ninth Circuit's strained efforts to distinguish *Grochowski* illustrate. The Ninth Circuit contended that the "analytical underpinning" of *Grochowski* was that "additional remedies" were available under the Davis-Bacon Act (purportedly unlike the statute at issue here, Section 340B of the Public Health Service Act, 42 U.S.C. 256b). See Pet. App. 25a-26a. In *Grochowski*, however, the Second Circuit did not rely on the presence of "additional remedies" in rejecting the third-party beneficiary theory: instead, it merely noted that the Davis-Bacon Act did not confer a private right of action, 318 F.3d at 85, and then concluded that the plaintiffs' third-party beneficiary claims constituted "indirect attempts at privately enforcing" the DBA's substantive requirements, *id.* at 86. If the Ninth Circuit had applied *Grochowski*'s reasoning here, it necessarily would have held that respondent's claim was foreclosed, because respondent has conceded that Section 340B confers no private right of action. See Pet. App. 22a. As a result, the Ninth Circuit's decision cannot be reconciled either with *Grochowski* or with the decisions of other circuits rejecting the third-party beneficiary theory. The ensuing circuit conflict warrants this Court's review.

B. The Court Of Appeals' Decision Is Erroneous

1. The Ninth Circuit's decision to permit a private plaintiff to bring suit to enforce statutory requirements under federal common law also cannot be reconciled with this Court's decisions. As the Court has recognized, "[t]here is, of course, 'no federal general common law.'" *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938)). To be sure, the Court has permitted the fashioning of federal common law in "few and restricted instances." *Atherton* v. *FDIC*, 519 U.S. 213, 225 (1997) (internal quotation marks and citation omitted). Those instances involve certain "havens of specialty," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 726 (2004), such as international relations, see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 424-427 (1964), and disputes between the States, see *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103-105 (1972). And to that end, the Court has held that federal common law governs the interpretation of contracts to which the federal government is a party. See, *e.g.*, *United States* v. *Seckinger*, 397 U.S. 203, 209-210 (1970).

2. This Court, however, has never sanctioned the use of federal common law as a means to enforce requirements in federal statutes that lack a private right of action. That is for good reason, because a claim by a private plaintiff seeking to enforce a statutory requirement on a third-party beneficiary theory is simply an implied right of action by another name. Particularly in recent years, the Court has repeatedly cautioned against judicial recognition of implied rights of action. See, *e.g.*, *Gonzaga University* v. *Doe*, 536 U.S. 273, 286 (2002) (explaining that, "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private

suit"); *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 67 n.3 (2001) (warning that "we have retreated from our previous willingness to imply a cause of action where Congress has not provided one"); *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001) (noting that "private rights of action to enforce federal law must be created by Congress," even if a private right of action might be "desirable * * * as a policy matter" or "compatible with the statute"). The Court has explained that "the Judiciary's recognition of an implied private right of action necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve." *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-165 (2008) (internal quotation marks and citation omitted). And where, as here, a private right of action would coexist with an express government enforcement mechanism, the result would be particularly problematic, because it would "permit enforcement without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727.

There is particular reason, moreover, not to permit a right of action to be created under the guise of federal common law. Because federal common law is "subject to the paramount authority of Congress," *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981) (citation omitted), it is only "resorted to in absence of an applicable Act of Congress." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 314 (1981) (brackets, internal quotation marks, and citation omitted). Here, precisely such an "applicable Act of Congress" existed, in the form of Section 340B. Any private right of action to enforce the requirements of that provision must be derived by "interpret[ing] the statute Congress has passed." *Sandoval*, 532 U.S. at 286. And the conceded absence of a private right of action in Section 340B ends

the analysis, because federal common law cannot confer a right of action where the statute does not. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 401 (1982) (Powell, J., dissenting) (noting the "fundamental legal error" of "basing a finding of an implied cause of action under a federal statute on common-law principles"). Even assuming that, as the Ninth Circuit contended, a right of action would be "wholly compatible with the [statute's] objectives," Pet. App. 26a, it would provide no basis for recognizing either an implied right of action or a right of action based on federal common law, because this Court long ago "abandoned" the notion that courts should "provide such remedies as are necessary to make effective the congressional purpose expressed by a statute." *Sandoval*, 532 U.S. at 287 (internal quotation marks and citation omitted).

The Ninth Circuit's decision is therefore flatly inconsistent with this Court's precedents concerning the limitations on the recognition of private rights of action to enforce statutory requirements. The Court should grant review to correct the Ninth Circuit's impermissibly expansive approach.

C. The Question Presented Is An Exceptionally Important One To American Businesses And Warrants The Court's Review In This Case

If left undisturbed, the Ninth Circuit's decision will have far-reaching and profound consequences for the millions of American companies that do business with the federal government. The decision threatens not only to impose substantial costs on those companies, but to disrupt the operations of government departments and agencies and to disserve the interests of millions of Americans who benefit from public-private partnerships of the type at issue here. This case presents an ideal op-

portunity for the Court to address a question of exceptional practical, as well as legal, significance.

1. This Court has long warned of the baleful consequences of expanding private enforcement of a federal statute through judicial fiat. Where a statute does not expressly confer a right of action, the judicial recognition of such a right disrupts the expectations of would-be defendants, who are suddenly forced to grapple with "extensive discovery," "the potential for uncertainty and disruption," and other litigation-related burdens that substantially raise the "costs of doing business." *Stoneridge*, 552 U.S. at 163-164. In many cases, those burdens will be sufficiently onerous as to "allow plaintiffs with weak claims to extort settlements from innocent [defendants]." *Id.* at 163; see *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007) (referring to litigation tactics that "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value") (citation omitted). Where the defendant is a business, moreover, the costs of defending against such litigation will be either absorbed (and thus borne by investors and employees) or passed on to consumers. See *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994).

The foregoing concerns apply with even greater force where, as here, the question is whether to recognize a right of action to enforce a statutory obligation by means of a third-party contract claim. Contract law demands "certainty and predictability." *Central Bank*, 511 U.S. at 188 (citation omitted). As with any other type of contract, parties to a government contract seek to establish the full scope of their obligations and potential liabilities *ex ante*, by memorializing them in a written document that reflects the parties' mutual understanding. Cf. *Hollerbach* v. *United States*, 233 U.S. 165, 171 (1914) (noting

that "[a] government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to giv[ing] it effect accordingly"). The expectations of the parties would be wholly disrupted, however, if a court were to permit an alleged third-party beneficiary to bring suit—and thereby potentially to impose massive costs on one of the parties to the contract—for the purpose of enforcing an obligation in a statute that does not by its terms allow for private enforcement.

2. This case amply demonstrates the dangers of permitting suit under federal common law in the absence of an express right of action. It is undisputed that, in entering into the contracts at issue, neither petitioners nor the Department of Health and Human Services (HHS) contemplated that Section 340B entities such as respondent would be able to sue as third-party beneficiaries to enforce petitioners' statutory obligations. See Gov't C.A. Br. 21 (noting that "HHS never imagined that a [Section] 340B entity could bring a third-party beneficiary lawsuit like [respondent's]"). Nor should petitioners or HHS have had reason to expect such litigation, in light of the absence of a private right of action in Section 340B and the extensive enforcement mechanisms already at HHS's own disposal. See *id.* at 13 (describing "Congress's comprehensive administrative and enforcement scheme," including HHS's powers to terminate contracts and to exclude manufacturers from Medicaid programs, and concluding that permitting third-party claims would "undermine HHS's role").

Put simply, the Ninth Circuit's decision upends the settled expectations of both petitioners and the federal government; it disrupts the complex and carefully calibrated framework that Congress established for the administration and enforcement of the Section 340B drug-

pricing and Medicaid rebate programs; and it exposes petitioners to all of the same consequences they would have faced if the Ninth Circuit had simply recognized an implied right of action in Section 340B. In this case, moreover, those consequences are particularly acute. Petitioners face the prospect of costly and extensive discovery—all on the basis of a handful of reports (one later rescinded) by HHS's Office of the Inspector General that do not even identify any specific manufacturers. See Pet. App. 99a, 109a-110a. And the litigation in this case threatens not only to result in potentially substantial liability, but to reveal information concerning petitioners' pricing policies that both petitioners and the federal government had previously understood to be held in confidence. Those serious ramifications would give any company pause before entering into a contract with the government—an outcome that cannot be reconciled either with congressional intent in enacting the particular statute at issue or with the broader government policy favoring public-private partnerships.

3. The highly detrimental consequences of the Ninth Circuit's decision reach far beyond the immediate context of this case. The Ninth Circuit's methodology, which would permit a private plaintiff to bring suit to enforce statutory requirements as a third-party beneficiary of a contract in the absence of a statutory right of action, could apply whenever a government contract incorporates an underlying statutory or regulatory requirement. The implications of that approach confirm the need for this Court's review.

To begin with, the scope of federal contracting is enormous. One recent estimate suggests that there are more than *seven million* federal contractors. See Kevin R. Kosar, *Privatization and the Federal Government: An Introduction*, Congressional Research Service Re-

port for Congress 16 (Dec. 28, 2006) (CRS Report) <tinyurl.com/crsreport>. In 2007 alone, American companies conducted approximately $460 billion of business with the federal government—more than twice as much as a decade earlier. See Federal Procurement Data System, *Federal Procurement Report, FY 2007*, at 2 (FPDS Report) <tinyurl.com/2007fpdsreport>. Some $70 billion of those contracts involved small businesses. See *id.* at 6. Even before the most recent spasms of growth in the size of government, government contracts constituted a substantial portion of diverse sectors of the national economy, including manufacturing ($164 billion in 2007); professional, scientific, and technical services ($123 billion); construction ($31 billion); transportation ($8 billion); and utilities ($2 billion). See *id.* at 31-34. And numerous government departments and agencies enter into sizable contracts with the private sector, including the Departments of Energy ($23 billion); Health and Human Services ($14 billion); Housing and Urban Development ($12 billion); and Veterans Affairs ($12 billion). See *id.* at 10. Those numbers, moreover, do not include federal grants to state and local governments, which often in turn direct the grants to the private sector in order to "construct and repair roads, build waste treatment plants, fund community renewal efforts, and so forth." CRS Report 18 n.82.

Unsurprisingly, when companies and the government enter into contractual arrangements, companies are often required to comply with statutory or regulatory requirements as a condition of doing business with the government. To take but a few examples, the Davis-Bacon Act requires companies undertaking construction projects for the government to pay their works according to a wage schedule set by the Department of Labor. See 40 U.S.C. 3142. The Rehabilitation Act requires

companies doing business with the government to take "affirmative action" to employ disabled individuals. See 29 U.S.C. 793. And Executive Order 11,246 requires companies doing business with the government to agree not to discriminate on the basis of race, creed, color, or national origin. See Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12,320 (1965), *reprinted in* 42 U.S.C. 2000e note.

None of the foregoing provisions confers an express right of action to enforce its requirements; the same is true for the vast majority of other statutes applicable to government contractors. The Ninth Circuit's decision, however, would replace the traditional understanding that the absence of a private right of action forecloses suit with an open-ended approach that invites speculation as to whether a private party was an intended beneficiary of the statute or contract in question. The practical effect of such an approach would be to expose any company that has entered into a government contract incorporating an underlying statutory requirement to the potential of costly and unanticipated litigation. It would create a serious disincentive for companies to engage in business with the government going forward. And it would impose burdens on the government itself, insofar as the government would have to provide greater compensation to offset the potential costs of third-party litigation and thereby induce companies to enter into government contracts.

Perhaps the most serious of those consequences is the chilling effect the Ninth Circuit's approach promises to have on business activity between the private and public sectors. "Since its founding in 1789, the federal government has used private firms to provide goods and services." CRS Report 1; see, *e.g.*, Act of Aug. 7, 1789, § 3, 1 Stat. 54 (requiring the Secretary of the Treasury to

"provide by contracts * * * for building a lighthouse near the entrance of Chesapeake Bay"). The federal government has frequently turned to the private sector to provide goods and services to the American people in a cost-effective, high-quality, and reliable manner. Private entities now manage public schools, run prisons, oversee welfare programs, provide drug-abuse counseling, and offer employment training. See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229, 1231-1232, 1267 (2003). And they are often integrally involved in major government policy initiatives, as illustrated by the health-care programs at issue here.

By destabilizing existing government contracts and creating disincentives for companies to enter into new ones, the Ninth Circuit's decision disrupts the public-private partnerships that have long contributed to the well-being of the country and its citizens. To be sure, it is well established that private entities that do business with the government may not act with impunity. The same statutory provisions that authorize particular government contracts, however, must also establish any available enforcement mechanisms. And it is ultimately up to the political branches to decide what enforcement mechanisms to provide and who may invoke them. It is not the role of the Judiciary to substitute its judgment for that of the political branches and to create as a matter of federal common law a right of action that does not exist as a matter of statute. The Ninth Circuit's decision to arrogate such lawmaking authority to itself is erroneous and has far-reaching implications. The Court should grant review and reverse that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2010