No. 09-1273

In the Supreme Court of the United States

ASTRA USA, INC., ET AL., PETITIONERS

v.

COUNTY OF SANTA CLARA

ON 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 ami-

cus 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 under review, the Ninth Circuit held that a private plaintiff was entitled to pursue such a suit. That decision directly implicates the interests of the Chamber and its 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 track statutory or regulatory requirements, or require contracting parties to comply with those 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 those requirements as a third-party beneficiary of the contract where, as is frequently the case, the plaintiff had no statutory right of action.

If the Ninth Circuit's decision were allowed to stand, it would have dire and sweeping consequences. Compa-

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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. The parties have entered blanket consents to the filing of amicus briefs, 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.

nies that do business with the government would be exposed to burdensome and expensive litigation, with the possibility of significant liability and the unjustified disclosure of confidential information. If adopted by this Court, the Ninth Circuit's approach would 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 it would 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 the ones at issue here. For those reasons, the Chamber and its members have a significant interest in the disposition of this case.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case is patently erroneous. By 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 here forecloses efforts to enforce those requirements through other means. The Court should reverse the judgment below in order to bring the Ninth Circuit's aberrant mode of analysis in line with the Court's decisions.

If the Ninth Circuit's decision is allowed to stand, it would be 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 when 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. Those dramatic consequences confirm the folly of the Ninth Circuit's approach.

ARGUMENT

A. The Court Of Appeals' Decision Is Erroneous

1. In the decision under review, the Ninth Circuit held that a private plaintiff was entitled to bring suit to enforce statutory requirements as a third-party beneficiary of a contract where the plaintiff had no statutory right of action. See Pet. App. 29a. That holding 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).

The 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).

The Court has suggested, moreover, that permitting private plaintiffs to bring suit in the absence of an ex-

press right of action would be particularly problematic where, as here, such an implied private right of action would coexist with an express *government* enforcement mechanism. In such circumstances, the implied private right of action would "permit enforcement without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727. Accordingly, the Court has explained, "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290; see *Gonzaga*, 536 U.S. at 289-290 (refusing to recognize "individually enforceable private rights" in light of other "mechanism[s] that Congress chose to provide for enforcing" the statutory obligations at issue).

Finally with regard to the Court's jurisprudence, there is all the more reason not to permit a right of action to enforce a statutory requirement 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). As a result, any private right of action to enforce a statutory requirement must be derived by "interpret[ing] the statute Congress has passed." *Sandoval*, 532 U.S. at 286. The absence of a private right of action in the statute at issue thus 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").

2. The Ninth Circuit's decision founders in the face of those well-established principles. There can be no doubt that, in its underlying claim, respondent is seeking to enforce the requirements of Section 340B of the Public Health Service Act, 42 U.S.C. 256b—the statute establishing the discounted-drug program in question. As is relevant here, Section 340B requires the Secretary of Health and Human Services (HHS) to enter into agreements with manufacturers of covered outpatient drugs under which "the amount required to be paid * * * to the manufacturer for covered drugs * * * purchased by a covered entity * * * does not exceed an amount equal to the average manufacturer price * * * reduced by the rebate percentage." 42 U.S.C. 256b(a)(1). Mirroring that statutory obligation, the standard pharmaceutical pricing agreement provides that each manufacturer "agrees * * * to charge covered entities a price for each unit of the drug that does not exceed an amount equal to the [average manufacturer price] * * * reduced by the rebate percentage." Pet. App. 170a. The Ninth Circuit itself conceded that Section 340B "specif[ies] the * * * terms" of the contracts at issue here; that the contracts "closely track[]" the statutory language; and that the contracts further provide that "ambiguities shall be interpreted in the manner which best effectuates the statutory scheme." *Id.* at 15a.

In addition, respondent has acknowledged that Section 340B confers no private right of action. See Pet. App. 22a. Under this Court's jurisprudence, that is the beginning and the end of the inquiry: because Congress accordingly cannot have "intend[ed] to create new individual rights" when it enacted Section 340B, "there is no basis for a private suit." *Gonzaga*, 536 U.S. at 286. That is true, moreover, regardless of whether the private plaintiff's suit is brought under 42 U.S.C. 1983, an im-

plied right of action, or a third-party beneficiary theory of the type respondent is advancing. *Gonzaga*, 536 U.S. at 286. No matter the precise mechanism invoked by the plaintiff, such a suit would implicate precisely the same interests, disrupting carefully calibrated statutory schemes and, in so doing, raising serious separation-of-powers concerns. See, *e.g.*, *Stoneridge*, 552 U.S. at 165 (observing that "[t]he determination of who can seek a remedy has significant consequences for the reach of federal power"); *Sosa*, 542 U.S. at 727 (stating that "[t]he creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not").

3. The Ninth Circuit's justifications for its novel and expansive approach are unavailing.

a. In defense of its approach, the Ninth Circuit contended that the recognition of a private right of action here would be "wholly compatible with the [statute's] objectives." Pet. App. 26a. Even assuming that is so, it is insufficient to justify the recognition of either an implied right of action or a right of action based on federal common law. 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); see *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (observing that "[p]olicy considerations cannot override our interpretation of the text and structure of [a statute]").

In any event, it is far from clear that recognition of a private right of action would actually advance the statute's objectives. In contending that it would, the Ninth Circuit, relying solely on a House committee report, concluded that the statutory purpose was to "giv[e] covered

entities discounts so they [can] stretch scarce Federal resources as far as possible." Pet. App. 27a (internal quotation marks and citation omitted). As the government argued below, however, the purpose of the statutory scheme is far more nuanced than the Ninth Circuit suggests: for example, while covered entities have an interest in lower average manufacturer prices (because they lead to lower maximum prices that the entities can be charged), the States actually have an interest in *higher* average manufacturer prices (because they lead to larger Medicaid rebates for the States). See Gov't C.A. Br. 31.

b. The Ninth Circuit additionally contended that recognition of a private right of action would be "sensible" because it would avoid "plac[ing] the entire burden of enforcement on the government." Pet. App. 27a. That contention, however, is wholly at odds with the government's own assessment that recognition of a private right of action "would conflict with Congress's comprehensive administrative and enforcement scheme[] and accord [private parties] contract rights never intended by the [contract's] signatories." Gov't C.A. Br. 21.

In contending that recognition of a private right of action was necessary to supplement the government's own enforcement mechanisms, the Ninth Circuit greatly understated the scope of those mechanisms—and thus the extent to which recognition of a private right of action would disrupt them. The Ninth Circuit did acknowledge that both HHS's own regulations and the standard pharmaceutical pricing agreement provide for dispute resolution if a manufacturer is believed to have overcharged covered entities. See Pet. App. 16a-17a, 26a, 174a; 61 Fed. Reg. 65,412 (1996) (stating that among the "[d]isputes resolved by" HHS's dispute resolution process is one in which "[a] covered entity believes that a

manufacturer is charging a price * * * that exceeds the ceiling price as determined by section 340B"). Those mechanisms are not trivial: if, after dispute resolution, the Secretary finds that a manufacturer has not complied with its statutory and contractual obligations, the Secretary may require the manufacturer to reimburse overcharged entities and may even terminate the agreement altogether. See Pet. App. 174a; 61 Fed. Reg. 65,412-65,413. The latter remedy is an especially severe punishment, because, in the absence of a pharmaceutical pricing agreement with HHS, *all* of a manufacturer's medicines are ineligible for Medicaid coverage. See 42 U.S.C. 1396r-8(a)(1), (a)(5).

As the Ninth Circuit failed to recognize, moreover, HHS wields additional tools by which it can enforce manufacturers' reporting of price data. Those tools are significant because, at bottom, a claim that covered entities were overcharged by a manufacturer will (as here) ordinarily turn on the premise that the manufacturer incorrectly reported data concerning average manufacturer and best prices—data, in turn, that determine the maximum price the manufacturer can charge. Under federal law, HHS can audit a manufacturer's calculations of average manufacturer and best prices, and it can survey manufacturers and wholesalers in order to verify the underlying data that a manufacturer submits concerning those prices. 42 U.S.C. 1396r-8(b)(3)(A)-(B). HHS can impose substantial monetary penalties for the submission of false or untimely data: $100,000 for "each item" of false information, and $10,000 for "each day" that a submission is untimely. 42 U.S.C. 1396r-8(b)(3)(C). HHS can also terminate a manufacturer's participation in the Medicaid rebate program for violation of applicable requirements. See 42 U.S.C. 1396r-8(b)(4)(B)(i). And in conjunction with the Department of Justice, HHS

can even bring suit against a manufacturer under the False Claims Act, 31 U.S.C. 3729—as HHS regulations expressly contemplate, see 61 Fed. Reg. 65,413, and as the government has done in at least one recent instance to the benefit of covered entities such as respondent. See News Release, Department of Justice, *Aventis Pharmaceutical to Pay U.S. $95.5 Million to Settle False Claims Act Allegations* (May 28, 2009) <tinyurl.com/2009fca> (noting that, as part of the settlement of a suit under the False Claims Act, a manufacturer agreed to pay over $6 million to covered entities that "paid inflated prices for the drugs at issue").

Because the government has numerous enforcement mechanisms at its disposal (and is evidently willing to use them), this is not a situation in which an alleged statutory violation is "in search of a remedy." *Malesko*, 534 U.S. at 74. And the availability of government enforcement mechanisms underscores the difficulty with the Ninth Circuit's approach, because it is an "elemental canon of statutory construction" that, when a statutory scheme "provides a particular remedy or remedies," a court should be "chary of reading others into it." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979).

In sum, the Ninth Circuit's decision is flatly inconsistent with this Court's precedents concerning the limitations on the recognition of private rights of action to enforce statutory requirements. And the Ninth Circuit's justifications for its novel approach are invalid. This Court should reject that approach and reverse the judgment below.

B. If Adopted By This Court, The Court Of Appeals' Approach Would Have Devastating Consequences For American Companies That Contract With The Federal Government

A rule that permits private plaintiffs to bring suit to enforce statutory requirements as third-party beneficiaries would have far-reaching and profound consequences for the millions of American companies that do business with the federal government. If adopted by this Court, the Ninth Circuit's approach 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. For those reasons, too, the Ninth Circuit's approach should be rejected.

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*, 511 U.S. at 189.

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] [g]overnment 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"). Businesses, in particular, need clear and understandable rules to follow. See, *e.g.*, *Pinter* v. *Dahl*, 486 U.S. 622, 654 n.29 (1988). The expectations of the parties to a contract would be wholly disrupted 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, by its terms, does not 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 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 did petitioners

or HHS have any 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 disposal. See *id.* at 13 (concluding that permitting third-party claims would "undermine HHS's role" in enforcing Section 340B); see generally pp. 9-11, *supra* (discussing enforcement mechanisms).

The Ninth Circuit's novel approach thus upended the previously settled expectations of both petitioners and the federal government. If adopted by this Court, that approach would disrupt the complex and carefully calibrated framework that Congress established for the administration and enforcement of the Section 340B drug-pricing and Medicaid rebate programs. In this case, moreover, the consequences would be 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 this litigation threatens not only to impose considerable burdens on petitioners, but potentially to reveal information concerning petitioners' pricing policies that was previously understood to be confidential. See 42 U.S.C. 1396r-8(b)(3)(D). Permitting this litigation to go forward would thus be inconsistent both with congressional intent in enacting Section 340B and with the broader government policy favoring public-private partnerships.

3. The highly detrimental consequences of recognizing a cause of action in the circumstances presented here, however, reach far beyond the immediate context of this case. A rule that permits private plaintiffs to bring suit to enforce statutory requirements as third-party beneficiaries could apply whenever a government contract incorporates an underlying statutory or regula-

tory requirement. The vast implications of such a rule confirm the necessity of rejecting it.

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 Report 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 <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); and Veterans Affairs ($12 billion). See *id.* at 10-11. 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 re-

quirements 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 workers 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. 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. And other federal laws require companies doing business with the government to "provide a drug-free workplace," 41 U.S.C. 701, and prohibit them from using appropriated funds for certain lobbying activities, see 31 U.S.C. 1352.

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. See, *e.g.*, *Grochowski* v. *Phoenix Construction*, 318 F.3d 80, 86 (2d Cir. 2003) (holding that plaintiffs' third-party beneficiary claims were "indirect attempts at privately enforcing" the Davis-Bacon Act, and deeming the claims "clearly an impermissible 'end run' around [the Act]"). The approach adopted by the Ninth Circuit, however, would replace the traditional understanding that the absence of a private right of action forecloses suit with an open-ended, speculative, and unpredictable analysis. 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. Such an approach cannot readily be reconciled with the Court's reluctance to adopt legal rules that "compromis[e] the Government's practical capacity to make contracts" and thereby undermine "the myriad workaday transactions of its agencies." *United States* v. *Winstar Corp.*, 518 U.S. 839, 884 (1996) (plurality opinion); see *id.* at 913 (Breyer, J., concurring) (explaining that the government must be "able to obtain needed goods and services from parties who might otherwise * * * be unwilling to undertake" government contracts).

Perhaps the most serious of the consequences of the Ninth Circuit's approach is the chilling effect it promises to have on business activity between the private and public sectors. "Since the founding of the Republic, the federal government has hired or contracted with private firms to provide public goods and services." CRS Report 2; 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 in-

itiatives, 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 a common-law right of action that does not exist as a matter of statute. The Ninth Circuit's decision to arrogate such law-making authority to itself is erroneous and has far-reaching implications. The Court should reverse that decision and restore the preexisting understanding of the appropriate scope of private rights of action.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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