No. 09-1273

IN THE
Supreme Court of the United States

ASTRA USA, INC., *et al.*,
Petitioners,
v.

COUNTY OF SANTA CLARA, On Behalf of Itself and All Others Similarly Situated,
Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, in the absence of a private right of action to enforce a statute, federal courts have the federal common law authority to confer a private right of action on non-parties to a contract that embodies the statutory requirements sought to be enforced, based on a theory that the non-parties are intended third-party beneficiaries of the contract.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF defends and promotes free enterprise, individual rights, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to opposing efforts to create new private rights of action based on federal common law. WLF has appeared before this and other federal courts in numerous cases to espouse its view that if new federal causes of actions are to be created, the impetus for doing so should come from Congress, not the courts. *See, e.g., Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 178 L. Ed. 2d 241 (2010).

WLF is concerned that if allowed to stand, the decision below will be cited in support of efforts to create new causes of action under a broad range of federal regulatory programs. WLF recognizes that federal courts have a responsibility, *in the absence of legislation*, to fashion federal common law in cases raising issues of uniquely federal concern. But where, as here, Congress has adopted legislation that speaks directly to the issue at hand (whether beneficiaries of federal health care statutes are entitled to file suit to

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

enforce the terms of those statutes), there is no appropriate role for judicially created federal common law.

WLF is filing this brief to promote the interests of the business community and the public at large. It has no direct interest, financial or otherwise, in the outcome of this lawsuit. Because of its lack of direct interest, WLF believes that it can assist the Court by providing a perspective distinct from that of any party.

STATEMENT OF THE CASE

Respondent County of Santa Clara operates several medical facilities that qualify for special prescription drug price discounts under federal law. Santa Clara alleges that Petitioners (a large number of pharmaceutical manufacturers) failed to provided it with the discounts to which it was entitled. At issue before the Court is whether federal common law entitles Santa Clara to sue Petitioners to recover its alleged overpayment.

The price discount program is commonly known as the Section 340B program. Section 340B of the Public Health Service Act of 1992 (the "340B Act"), 42 U.S.C. § 256b, requires drug manufacturers that participate in the federal Medicaid program to offer discounted drug prices to certain hospitals and clinics, referred to as "Section 340B entities," that provide services to low-income individuals.[2] The Santa Clara

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[2] Drug companies that participate in Medicaid may charge Section 340B entities no more than the "ceiling price," 42 U.S.C.

medical facilities are among the thousands of Section 340B entities throughout the country.

The § 340B Act and the Medicaid Act also both require drug companies participating in Medicaid to sign a contract with the Secretary of Health and Human Services, in which they explicitly agree to comply with the § 340B Act's price ceiling. 42 U.S.C. §§ 256b(a)(1); 1396r-8(a)(1) & (5). Each of the Petitioners has signed this contract, known as the Pharmaceutical Pricing Agreement (PPA). *See* Pet. App. 165a-181a. All the PPA contracts contain uniform language drafted by the Secretary. The PPA provides, *inter alia*, that "[t]he Agreement shall be construed in accordance with Federal common law, and ambiguities shall be interpreted in the manner which best effectuates the statutory scheme." PPA § VII(g), Pet. App. 180a.

Alleging that Petitioners sold their drugs at prices that exceeded the price ceiling, Santa Clara filed suit to recover the overcharges, invoking a variety of legal theories. After the district court dismissed its complaint without leave to amend, Santa Clara appealed on a single claim only. It asserted that Petitioners had breached the PPA by charging prices in excess of the price ceiling, and that it was entitled to sue as an intended third-party beneficiary of the PPA.

Agreeing that Santa Clara had stated a valid breach of contract claim, the Ninth Circuit reversed and remanded. Pet. App. 1a-29a. The court determined that

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§ 256b(a)(1), a term whose statutory definition incorporates definitions and pricing methodology from the Medicaid Act.

the PPA should be analyzed under the federal common law of contracts. *Id.* at 8a-10a. It held that the federal common law of contracts provides that a non-contracting party is entitled to recover under a contract if he is an intended beneficiary of the contract. *Id*. at 10a. It then analyzed the PPA and concluded that the parties thereto "clearly intended to grant covered [§ 340B] entities enforceable rights as intended beneficiaries of the agreement." *Id.* at 13a.

The court accepted Santa Clara's concession that, in adopting the § 340B Act, Congress had not intended to create a private right of action under the Act. *Id.* at 22a & n.15. The court nonetheless held that the absence of a private right of action under § 340B did not affect its analysis regarding Santa Clara's breach of contract action. The court stated, "We presume that Congress legislates with the expectation that the principles of the federal common law 'will apply except when a statutory purpose to the contrary is evident.'" *Id.* at 23a (quoting *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). The court concluded that no such contrary purpose was evident because "[p]ermitting covered entities to sue as intended beneficiaries of the PPA is . . . wholly compatible with the Section 340B program's objectives." *Id.* at 26a.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision was based on a fundamental misunderstanding of federal common law. The court began by assuming that all actions alleging the breach of a contract to which the United States is a

party are governed by a federal common law of contracts unless Congress has made evident a contrary intent. Not discerning such an intent, the court proceeded to decide the case based on its understanding of federal common law principles, including the rights of intended third-party beneficiaries of a contract.

The appeals court's initial premise was mistaken: there is no transcendental body of federal common law awaiting to be applied to federal contracts. This Court has stated repeatedly that there is no federal general common law, and that the instances in which federal courts are called upon to formulate substantive rules of decision are few and restricted. Where a specific issue warrants creation of a federal rules of decision, Congress (not a federal court) is the most appropriate decisionmaker. Federal courts are to create federal common law only "in the absence of an applicable Act of Congress." *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). In this case, there never was an absence of "an applicable Act"; at the same time that Congress adopted the § 340B Act, it made clear that the Act's price ceiling provision was not to be privately enforceable in federal court. Thus, there was never a need to develop a federal common law with respect to the rights of third-party beneficiaries under the PPA, and there was no existing federal common law for Congress to displace.

The Ninth Circuit applied a presumption that federal common law remains in place unless a contrary congressional intent is "evident." Pet. App. 23a. The court's decision to apply that presumption was erroneous, even if one assumes that there were

background principles of federal common law to be applied here. This Court has explained that no presumption against displacement of federal common law comes into play unless the federal common law doctrine at issue is so well established that Congress can be assumed to have considered the impact of its legislation on that doctrine. In the absence in this case of a well-established federal common law doctrine, the presumption operates the other way: we start with the presumption that Congress, through its legislation, created the operative rule of decision.

In determining that Santa Clara stated a cause of action for breach of contract under a third-party beneficiary theory, the Ninth Circuit relied heavily on evidence that Congress adopted the § 340B Act (and required drug companies to sign the PPA) for the purpose of benefitting § 340B entities. But this Court has never deemed it decisive, in determining whether Congress intended to grant a private right of action to a class of plaintiffs, that Congress adopted the legislation at issue for the purpose of benefitting those plaintiffs. On numerous occasions the Court has concluded that Congress did not intend to bestow a private right of action on the intended beneficiaries of a statute. Accordingly, given that Congress, in adopting the § 340B Act, decided *not* to grant § 340B entities a private right of action to enforce the price ceiling, findings that the § 340B Act was adopted for the purpose of benefitting § 340B entities provide no legitimate basis for the Ninth Circuit's decision that the federal common law grants them a right of action to enforce the PPA.

ARGUMENT

I. THERE CAN BE NO BASIS FOR CREATING FEDERAL COMMON LAW RULES IN THIS CASE WHEN CONGRESS HAS ALREADY EXPRESSED ITS VIEWS REGARDING ENFORCEMENT OF THE § 340B ACT

The Ninth Circuit correctly determined that federal law governs Santa Clara's breach of contract claims. Pet. App. 8a. It is well accepted that, in light of the need for uniformity of decision, the interpretation of contracts to which the United States is a party presents a question of federal law:

> The purpose of the supremacy clause was to avoid the introduction of disparities, confusions, and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State.

United States v. County of Allegheny, 322 U.S. 174, 183 (1944).

But rather than looking to Congress for guidance regarding the federal law governing this case, the appeals court turned first to federal common law. Pet.

App. 8a. In doing so, the Ninth Circuit displayed a fundamental misunderstanding of the nature of federal common law. There is no transcendental body of federal common law awaiting to be applied to federal contracts. Rather, even when dealing with issues that are uniquely federal, federal courts are authorized to adopt federal common law contracting rules only when Congress has not addressed the issue, and even then only as a stop-gap measure until Congress acts. Thus, in addressing legal issues arising under contracts mandated by the § 340B Act, the Ninth Circuit should have turned first to the § 340B Act for guidance.

This Court has stated repeatedly that there is no general federal common law and that federal courts do not possess a general power to develop and apply their own rules of decision. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). When Congress has not spoken to a federal issue, federal courts may be called upon to develop federal common law to provide a rule of decision, but such instances are "few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). Any effort to fashion federal common law is "subject to the paramount authority of Congress," *New Jersey v. New York*, 283 U.S. 336, 348 (1931), and should only be resorted to "[i]n absence of an applicable Act of Congress." *Clearfield Trust*, 318 U.S. at 367. Federal courts "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

The aversion to reliance on federal common law is based on separation-of-powers concerns. *Northwest*

Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 95 (1981) ("[W]e have consistently recognized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is subject to the paramount authority of Congress."). As Justice Scalia has explained:

> The general rule, as formulated in *Texas Industries*[, *Inc. v. Radcliff Materials, Inc.*], 451 U.S. [630,] 640-641 [(1981)], is that "the vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." This rules applies not only to applications of federal common law that would displace a state rule, but also to applications that simply *create a private cause of action under a federal statute*.

Sosa v. Alvarez-Machain, 542 U.S. 692, 741-42 (2004) (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

The Ninth Circuit began by assuming that all actions alleging the breach of a contract to which the United States is a party are governed by a federal common law of contracts unless Congress has made evident a contrary intent. Not discerning such an intent, the court proceeded to decide the case based on its understanding of federal common law principles, including the rights of intended third-party beneficiaries under a contract.

As the preceding case law indicates, the Ninth

Circuit's approach was backwards; it should first have searched for evidence that Congress had spoken to the issues. Had it done so, it would have realized that there never was an absence of "an applicable Act of Congress," *Clearfield Trust*, 318 U.S. at 367, and thus there was no need to turn to federal common law. The PPA, the contract on which Santa Clara bases its cause of action, exists solely by virtue of Congress's adoption of the § 340B Act. Accordingly, the appeals court should have turned first to the § 340B Act for guidance on federal law applicable to the PPA. As Santa Clara concedes, Congress decreed that the Act's price ceiling provision was not to be privately enforceable in federal court. Once that federal rule is established, there is no reason for a court to attempt to fashion any sort of federal common law rule with respect to the rights of third-party beneficiaries under the PPA; there is simply no gap in need of filling.

In support of its decision to fashion federal common law, the Ninth Circuit pointed to § VII(g) of the PPA, Pet. App. 180a, which provides that the PPA is to be construed "in accordance with Federal common law." *Id.* at 8a. But § VII(g) does not suggest that courts should resolve disputed issues by resorting to federal common law principles even when Congress has spoken to the issue. Moreover, the final clause of Section VII(g) – "ambiguities shall be interpreted in the manner which best effectuates *the statutory scheme*" (emphasis added) – makes clear that the Secretary understood that the PPA must be construed in conjunction with all provisions of the § 340B Act.

As Petitioners have emphasized in their brief,

numerous provisions of the § 340B Act (*e.g.*, emphasis on maintaining the confidentiality of pricing data, the availability of alternative enforcement mechanisms) make plain that Congress did not anticipate that § 340B entities would be permitted to state claims based on alleged violations of the price ceilings. Because Congress has spoken directly to the question of such lawsuits – and because Santa Clara admits that Congress did not intend to create a private right of action under § 340B Act – any attempt to fashion a federal common rule covering the same subject matter would be inappropriate.

II. THE APPEALS COURT ERRED IN RELYING ON A PRESUMPTION AGAINST DISPLACEMENT OF FEDERAL COMMON LAW

The Ninth Circuit was unable to point to any evidence that either the Secretary or Petitioners actually intended to permit Santa Clara or any other § 340B entity to sue to enforce rights under the PPA. Rather, it was able to reach its conclusion that suit was authorized by: (1) adopting a presumption that Congress intended to authorize such suits; and (2) concluding that permitting such suits was "wholly compatible with the § 340 programs objectives." Pet. Pet. 23a, 26a. The court's decision to apply that presumption was erroneous.

The only circumstance under which the Court employs a presumption against displacement of federal common law occurs where "a common-law principle is well-established." *Astoria Fed. Savings & Loan Ass'n v.*

Solimino, 501U.S. 104, 108 (1991). The courts "may take as a given that Congress has legislated with an expectation" that any such well-established principle "will apply except 'when a statutory purpose to the contrary is evident.'" *Id.* (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). Even when the presumption applies, "long-established and familiar" federal common law principles will be deemed displaced even without a congressional statement "affirmatively proscrib[ing]" their use, so long as a federal statute "speak[s] directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993).

But the presumption has no application here because there is no well-established federal common law rule permitting suits by intended beneficiaries under contracts of this sort (*i.e.*, contracts mandated by a federal statute and intended to ensure compliance with a statutory requirement). Santa Clara has not pointed to any decisions of this Court or any federal court (other than the decision below) that invoked federal common law to authorize suit by a third-party beneficiary under such a contract. Petitioners have cited several decisions that suggest the absence of such a common law principle. *See, e.g., United States v. Erika, Inc.*, 456 U.S. 201, 211 n.14 (1982); *Univs. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981).

In the absence of a well-establish federal common law rule granting a cause of action to third-party beneficiaries, the Ninth Circuit erred in applying the presumption. This Court recently explained, in rejecting an argument that Congress (when adopting a

tax lien statute) should be presumed not to have intended to overturn a supposed common law rule that tax liens do not apply to property owned as tenants in the entirety:

> The common-law rule was not so well established with respect to the application of a federal tax lien that we must assume that Congress considered the impact of its enactment on the question now before us. There was not much of a common-law background on the question of the application of federal tax liens.

United States v. Craft, 535 U.S. 274, 288 (2002).

Indeed, the presumption actually runs the other way: we start with the presumption that Congress, through its legislation, created the operative rule of decision on the federal question at issue here. The Court explained in *City of Milwaukee* that the presumption against displacement of common law arises primarily in cases in which a federal statute arguably displaces *state* common law; in those circumstances, federalism concerns counsel hesitation before a court determines that federal law displaces a well-established common law rule. *City of Milwaukee*, 451 U.S. at 316. But:

> Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present, "*we start with*

> *the assumption*" that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

Id. (emphasis added).

Lower federal courts have on occasion applied federal common law to grant a cause of action to third party beneficiaries under federal procurement contracts. *See, e.g., D & H Distributing Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1997). But a federal procurement contract is of a fundamentally different nature than the PPA. Under a procurement contract, the government is entering the commercial marketplace to procure goods or services; the parties to such a contract can reasonably expect that their relationship is to be governed by the common-law commercial contracting principles dating back a thousand years, in the absence of an indication from Congress to the contrary. Thus, if the contract specifies that the proceeds of contract are to be paid to a third party, the contracting parties can reasonably be assumed to have intended that the third party may sue to enforce payment. *Id*. at 547. But contracts such as the PPA – under which a government requires contractors to agree to comply with pre-existing government regulations as a condition for continued participation in a government program – have no antecedents in the common law. Thus, when Congress adopted the § 340B Act, there was no well-established federal common law tradition governing how contracts mandated by the Act were to be construed. Under those circumstances there is no basis for presuming that federal common law governs how the PPA is to be construed in the absence of a congressional statement

that "speaks directly" to third-party beneficiary rights. The Ninth Circuit's ruling to the contrary cannot stand.

III. THE APPEALS COURT PLACED UNDUE WEIGHT ON CONGRESS'S DESIRE TO BENEFIT SECTION 340B ENTITIES

In arriving at its decision, the Ninth Circuit relied heavily on its conclusion that the chief purpose, if not the exclusive purpose, of the § 340 Act was to provide a financial benefit to § 340B entities by lowering their prescription drug costs. *See, e.g.*, Pet. App. 15a. In light of that conclusion, the court held that permitting § 340B entities to bring suit for breach of contract was "wholly compatible with the § 340 programs objectives." Pet. Pet. 26a.

In so holding, the appeals court placed undue emphasis on Congress's evident desire to benefit § 340B entities. This Court has repeatedly made clear that the mere fact that a plaintiff is an intended beneficiary of a federal statute is insufficient to justify a conclusion that Congress intended to permit the plaintiff to file suit to enforce the statute.

On numerous occasions the Court has concluded that Congress did not intend to bestow a private right of action on the intended beneficiaries of a statute. For example, the Court held that Congress did not intend to create a private right of action for those injured due to violations of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.*, even though such individuals undoubtedly were the people Congress intended to protect when it adopted the Act. *Transamerica*

Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). Similarly, the Court held that Congress did not intend to create a private right of action under the Employee Retirement Income Security Act (ERISA) for a beneficiary of a disability income plan seeking to sue a plan fiduciary that breached its fiduciary duties to the beneficiary under ERISA, even though ERISA undoubtedly was adopted for the benefit of such beneficiaries. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

Congress no doubt adopted the § 340B Act for the benefit of Santa Clara and similarly situated medical providers, for the purpose of reducing their drug purchasing costs. Nonetheless, it has already been determined that Congress, despite its strong desire to benefit § 340B entities, did not intend to create a private right of action on their behalf. It makes little sense, therefore, to craft a federal common law rule granting § 340B entities the right to sue as third-party beneficiaries of the PPA, based on little more than evidence that the Congress and the Secretary drafted the PPA for the purpose of benefitting those entities.

In sum, given that Congress, in adopting the § 340B Act, decided *not* to grant § 340B entities a private right of action to enforce the price ceiling, findings that the § 340B Act was adopted for the purpose of benefitting § 340B entities provide no legitimate basis for the Ninth Circuit's decision that the federal common law grants them a right of action to enforce the PPA.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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