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 United States Court of Appeals
for the Ninth Circuit

BRIEF OF FEDERAL COURTS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are scholars with expertise in federal jurisdiction, federal courts and constitutional law who have an interest in the proper interpretation of questions of federal common law and inferred-cause-of-action doctrine. In *Amici*'s view, the decision by the Ninth Circuit Court of Appeals in this case correctly holds federal common law applicable to this question of contract interpretation and should be affirmed. Additionally, *Amici* consider Petitioners' inferred-cause-of-action arguments inconsistent with the original meaning of Article III and an overextension of this Court's precedent.

INTRODUCTION

This is a contract case arising under federal common law. Respondent Santa Clara County ("Santa Clara") seeks to hold Petitioners, pharmaceutical manufacturers, accountable for breaching their contractual promises to sell drugs at reduced prices. Below, the Ninth Circuit held that Santa Clara was an intended, third-party beneficiary and thus able to sue Petitioners in an ordinary contract action under federal common law. *Amici* urge this Court to affirm.

In 42 U.S.C. § 256b(a)(1), Congress directs the Secretary of the Department of Health and Human Services ("HHS") to enter into contracts with phar-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief, and letters reflecting their blanket consent to the filing of *amicus* briefs have been filed with the Clerk.

maceutical manufacturers to ensure that "covered entities"—state and local public hospitals, community health centers, and other providers of safety-net health services—receive pharmaceutical products at significantly reduced prices.[2] In reference to § 340B of the original Public Health Service Act of 1944, this drug discounting program is commonly referenced as the "§ 340B program" and § 256b(a)(1) "covered entities" are often referred to as "§ 340B entities." HHS and Petitioners entered into the § 340B program contract that is at issue here: the Pharmaceutical Pricing Agreement ("PPA"). Pet. App. 165a–181a. The PPA sets forth a formula, which incorporates statutory language from § 256b, for determining discounted pricing for pharmaceutical products that are to be sold to § 340B entities. *Id.* at 170a–171a (PPA ¶ II(a)-(g)). Santa Clara purchases pharmaceuticals on behalf of county-run, federally qualified health centers, which are § 340B covered entities within the meaning of the PPA. *Id.* at 167a (PPA ¶ I(e)); *see also* 42 U.S.C. § 256b(a)(4) (defining covered entities).

Santa Clara alleges that Petitioners failed to properly reduce pharmaceuticals purchased by it and other similarly situated § 340B entities as required by the PPA, causing millions of dollars in damages. J.A. 50–54 (Second Am. Cmpt. ¶¶ 56–64). Santa Clara seeks to recover these damages from the alleged breach of the PPA by way of a federal common

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[2] The statute requires that the Secretary "enter into an agreement with each manufacturer of covered 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 for the drug under [§ 1396r-8(k)(1)] in the preceding calendar quarter, reduced by [a] rebate percentage described in [§ 256b(a)(2)]." 42 U.S.C. § 256b(a)(1).

law, third-party-beneficiary breach of contract cause of action. *Id.* at 63–64 (Second Am. Compl. ¶¶ 101–04); Pet. App. 180a (PPA ¶ VII(g)) (choice of law clause selecting federal common law).

The District Court dismissed the third-party-beneficiary claim on Petitioners' FED. R. CIV. P. 12(b)(6) motion. Pet. App. 119a. The Ninth Circuit reversed, see *id.* at 30a-58a, holding that § 340B entities, like Santa Clara, "are intended direct beneficiaries of the PPA and have the right as third parties to bring claims for breach of that contract." *Id.* at 36a. *Amici* urge this Court to affirm.

SUMMARY OF ARGUMENT

I. This Court should affirm the court of appeals' opinion and conclude that Santa Clara's third-party-beneficiary claim to enforce the PPA is governed by federal common law. Federal common law enforcement of the PPA follows from the fact that HHS is a party to the contract and the PPA's choice of law clause selects federal common law. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943); Pet. App. 180a (PPA ¶ VII(g)). Furthermore, Congress' use of the term "agreement" in § 256b(a)(1) evidences its intent that this Court deploy traditional common law of contract to enforce the PPA. *Se e Field v. Mans*, 516 U.S. 59, 70 (1995) (holding that when Congress deploys terms having well-defined meanings at common law, this Court must give the term that meaning); RESTATEMENT (SECOND) OF CONTRACTS § 1 & cmt. a (1979) (defining contract and agreement as a legally enforceable promise). As a result, this Court should deploy common law of contract principles to determine Santa Clara's status as an intended beneficiary under the PPA. *See Int'l Assoc. of Machinists, AFL-CIO v. Central Airlines, Inc.*,

372 U.S. 682, 691–93 (1963) (holding a collective-bargaining contract entered into pursuant to statutory command enforceable as a matter of federal common law). Petitioners' assertions to the contrary, see Pet. Br. 21–25, the fact that § 256b(a)(1) directs the Secretary to enter into contracts with Petitioners does not strip the enforcement of the PPA of its common law status. *See Jackson Transit Auth. v. Local Div. 1285*, 457 U.S. 15, 21 (1982) (reversing "the Court of Appeals[, which] treated this [enforcement of a statutorily directed agreement] as a private right of action case, [because] it does not fit comfortably in that mold.") (citation omitted); *United States v. Seckinger*, 397 U.S. 203, 209–10 & n.13 (1970) (holding that statutory authority for the government to enter into contracts leads to federal common law enforcement of such contracts); *Central Airlines, Inc.*, 372 U.S. at 693 (holding a contract entered into pursuant to statutory command enforceable as a matter of federal common law); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–57 (1957) (finding statutory command to create a body of federal contract law to govern labor-management disputes does not disturb that law's federal common law status). Nor does the fact that the PPA incorporates provisions of § 256b into the contract itself transform this Court's normal federal common law enforcement regime into an inferred-cause-of-action regime. *See Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604, 614 (2000) (enforcing government contracts under general principles of contract law—not inferred-cause-of-action doctrine—even though the contracts incorporated substantial portions of the Outer Continental Shelf Lands Act into the agreements); *Central Airlines*, 372 U.S. at 694 (enforcing collective-bargaining

agreement as a matter of federal common law of contract even though many of the alternative-dispute-resolution provisions were statutorily required).

II.A. Arguing that Santa Clara's federal common law claim is the functional equivalent of a claim inferred from statute, Petitioners and their supporting *amici* (with the notable exception of the United States) assert that *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001), marks a sea-change in statutory inferred-cause-of-action jurisprudence, contending the opinion holds that the federal courts lack power to infer causes of action from statute, including § 256b. *See* Pet. Br. 18–20; PhRMA Br. 5–7; Chamber of Commerce Br. 8–9. Petitioners err on this point. The question before the *Sandoval* Court was whether to infer a cause of action from *agency regulation*. *See Sandoval*, 532 U.S. at 278 (stating the question presented as one of regulatory inference—not statutory). The *Sandoval* holding does not address inferring causes of action from *statute*. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005) ("*Sandoval* held that private parties may not invoke Title VI *regulations* to obtain redress for disparate-impact discrimination.") (emphasis added). Moreover, this Court has twice inferred a cause action from federal statutes since the *Sandoval* opinion, further demonstrating Petitioners' position as unsound. *See CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 452–53 (2008) (inferring a retaliatory discrimination cause of action from 42 U.S.C. § 1981); *Jackson*, 544 U.S. at 177–78 (extending the inferred private right of action for Title IX suits to include retaliation claims).

II.B. Moreover, the overwhelming Founding-era authority demonstrates that the power to infer causes of action from statutes adheres to the original un-

derstanding of Article III judicial power. *See, e.g.*, *Ashby v. White*, (1703) 92 Eng. Rep. 126, 136–39 (K.B.) (inferring a cause of action for the failure, contrary to statute, to tally votes in a parliamentary election); Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 838–51 (2004) (providing an original-meaning discussion of Article III and the power of federal courts to infer causes of action). At the time of the Founding, "[i]f a statute did not expressly confer a remedy on the plaintiff, a cause of action [at law] for its violation would lie . . . if one of the forms of action—e.g., debt, case, assumpsit—provided a remedy for the kind of injury that the statutory violation caused." Bellia, 89 IOWA L. REV. at 840–41. The common law, moreover, has recognized third-party-beneficiary claims since at least 1677. *See Dutton v. Poole*, (1677) 83 Eng. Rep. 523 (K.B.), *aff'd* (1679) 83 Eng. Rep. 156 (Ex. Ch.). As a result, should this Court decide that finding a federal common law, third-party-beneficiary claim to enforce the PPA is the functional equivalent of inferring a cause of action under the statute, there are no original-meaning-based interpretations of Article III supporting Petitioners' broad-based prohibition upon inferring a cause of action from § 256b. *See* Bellia, 89 IOWA. L. REV. at 851.

III. Santa Clara's assertion of a federal common law claim to enforce the PPA does not create separation-of-powers concerns, contrary to the suggestion of Petitioners and supporting *amicus* United States Chamber of Commerce. *See* Pet. Br. 17–19; Chamber of Commerce Br. 5. Traditional statutory construction tools illuminate strong congressional intent to enforce the PPA by way of the federal common law of contract, see *infra* pp. 7–14, which distinguishes

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc. from the case at bar. *See* 552 U.S. 148, 164–65 (2008) (finding no congressional intent for private aiding-and-abetting causes of action). Moreover, the separation-of-powers position presented in *Stoneridge* rides on the faulty notion that only a federal cause of action vests jurisdiction under 28 U.S.C. § 1331. *See* Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175, 182–208 (2010) (tracing the history of this line of argumentation and concluding that it is founded upon a defective understanding of 28 U.S.C. § 1331 doctrine). This Court's renewed commitment to federal jurisdiction without the need for a congressional cause of action, see *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (holding that federal question jurisdiction may vest under § 1331 without a federal cause of action), undercuts the notion that inferring a cause of action from § 256b violates separation-of-powers principles. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 746 n.17 (1979) (Powell, J., dissenting) (recognizing this issue).

ARGUMENT

I. SANTA CLARA'S THIRD-PARTY-BENEFICIARY CLAIM IS CONTROLLED BY FEDERAL COMMON LAW.

This is a federal common law of contract case. The happenstance that Santa Clara assumes, for the purposes of this suit, that § 256b does not imply an action for a third-party-beneficiary claim directly under the statute, see Pet. App. 22a n.15, does not preclude it from relying upon congressional intent to create a federal common law remedy. Nor does § 256b's undergirding of the PPA affect the federal common law status of its enforcement. First, stan-

dard federal common law doctrine establishes its applicability to the enforcement of the PPA. Second, Congress is empowered to select by statute federal common law enforcement of certain fields, which it chose to do here. Third, the fact that § 256b(a)(1) directs the Secretary to enter into contracts with Petitioners does not transform this rather straightforward federal common law question into an issue of whether a third-party-beneficiary claim may be inferred from § 256b directly. Fourth, the PPA's incorporation of statutory language lacks this transformative effect as well.

First, blackletter federal common law doctrine supports its application to the interpretation of the PPA. HHS is a party to the PPA, rendering the contract subject to federal common law enforcement. *See Clearfield Trust*, 318 U.S. at 366 (holding the United States commercial transactions subject to federal common law); 19 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4515 & n.10 (2007) (collecting cases establishing the proposition that federal common law governs "the validity, interpretation, or enforcement of government contracts"). Moreover, the PPA's choice of law provision selects federal common law. Pet. App. 180a (PPA ¶ VII(g)). This Court, then, as a matter of federal common law may readily look to general principles of contract law for the relevant third-party-beneficiary rule to apply to Santa Clara's claim under the PPA. *See Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947) ("It is customary, when Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law."). Pursuant to these general principles of

contract law, intended third-party beneficiaries may enforce government contracts such as the PPA. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. ___, ___, 129 S. Ct. 1896, 1902 (2009) ("'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through . . . 'third-party beneficiary theories'") (quoting 21 R. Lord, WILLISTON ON CONTRACTS § 57:19, p. 183 (4th ed. 2001)); RESTATEMENT (SECOND) OF CONTRACTS § 313(1) ("The rules stated in this Chapter[, relating to third-party beneficiaries,] apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.").[3]

Second, Congress may direct by statute that certain fields be governed by federal common law without robbing those fields of their common law character. This Court has often so held. *See Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 377 (2002) ("Congress intended a 'federal common law of rights and obligations' to develop under ERISA."); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 642 (1981) (instructing that federal common law may be crafted pursuant to statutory directive). In particular, Congress may choose to regulate certain fields by statutorily directing parties to enter into contracts and enforcing these agreements as a matter of common law. *See Jackson Transit*, 457 U.S. at 21 (holding statutorily directed agreements are to be enforced pursuant to state contract law and specifi-

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[3] Whether Santa Clara is an intended, third-party beneficiary of the PPA as a matter of contract law is beyond the scope of this brief. *Amici* contend only that this question should be determined as a matter of federal common law of contract.

cally reversing "the Court of Appeals[, which] treated this as a private right of action case, [because] it does not fit comfortably in that mold.") (citation omitted); *Central Airlines*, 372 U.S. at 693 (holding a contract entered into pursuant to statutory command is, "like the Labor Management Relations Act s 301 contract, . . . a federal contract and is therefore governed and enforceable by federal [common] law, in the federal courts.").

Congress took precisely this route here by choosing to enforce reduced pharmaceutical pricing to § 340B entities by contract. Congress directed the Secretary to "enter into an agreement with each manufacturer of covered drugs." 42 U.S.C. § 256b(a)(1). When Congress deploys a term such as "agreement," absent strong evidence to the contrary, this Court must give that term its established common law meaning. *See Field*, 516 U.S. at 70 ("It is well established that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotations and citations omitted). The term "agreement" is a well understood synonym for contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1, cmt. a ("The word 'contract' is . . . . a synonym for 'agreement.'"). Furthermore, the American usage of the terms "contract" and "agreement" are universally understood to mean "a promise or a set of promises for the breach of which the law gives a remedy." *Id.* at § 1; *see also Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 864 (1983) (Blackmun, J., concurring in part and dissenting in part) ("It is a fundamental canon of statutory construction that 'unless otherwise defined, words

will be interpreted as taking their ordinary, contemporary, common meaning.' In its ordinary meaning, a 'contract' is a legally enforceable bargain.") (citations omitted). Thus Congress, by directing HHS to enter into an "agreement," directed the federal courts to remedy breaches of the PPA by way of common law contract jurisprudence. *See Jackson Transit*, 457 U.S. at 20–21 ("[S]ince § 13(c) contemplates . . . collective-bargaining agreements between those parties . . . it is reasonable to conclude that Congress expected the . . . collective-bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach.") (internal citation omitted); *id.* at 30 (Powell, J., concurring) (noting that when "Congress . . . provide[s] for the making of contracts . . . it must have intended [for them] to be enforced."); *Central Airlines*, 372 U.S. at 693 (similar).

Third, the fact that § 256b(a)(1) directs the Secretary to enter into contracts with Petitioners does not strip the enforcement of these contracts of their federal common law status. In fact, this Court has held that statutory authorization to enter into a contract is a paramount reason to interpret government contracts pursuant to federal common law. *See Seckinger*, 397 U.S. at 209–10 & n.13 ("[W]e agree with the court of appeals that federal law controls the interpretation of the contract. This conclusion results from the fact that the contract was entered into pursuant to authority conferred by federal statute.") (citations omitted). Indeed, it is now well established that when Congress regulates a field by the use of the traditional tools of contract law, this Court holds such contracts enforceable pursuant to the federal common law of contracts rather than by way of inferred-cause-of-action doctrine. *See, e.g., Jackson*

Transit, 457 U.S. at 21 (rejecting enforcement by way of an inferred cause of action in favor of contract law enforcement);[4] *Central Airlines, Inc.*, 372 U.S. at 691 ("If these contracts are to serve this function under s 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme."); *Lincoln Mills*, 353 U.S. at 456–57 (finding statutory directive to create a body of federal contract law to govern labor-management disputes without disturbing that law's federal common law status); *see also Granite Rock Co. v. International Broth. of Teamsters*, 561 U.S. ___, ___, 130 S. Ct. 2847, 2855 n.2 (2010) (reaffirming the holding in *Lincoln Mills* as one of federal common law). As a result, the statutory directive in § 256b(a)(1) to the

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[4] Legislative history may lead to the conclusion, in certain cases, that state common law of contracts, as opposed to federal, should control statutorily commanded agreements. *See Jackson Transit*, 457 U.S. at 29 ("Given this explicit legislative history, we cannot read § 13(c) to create federal causes of action for breaches of § 13(c) agreements . . . . The legislative history indicates that Congress intended those contracts to be governed by state law.") (footnote omitted). Of import here, even though the *Jackson Transit* Court found federal common law of contract inapposite, it, nonetheless, held that the 49 U.S.C. § 1609(c) agreements at issue were enforceable as a matter of common law of contract—not inferred-cause-of-action doctrine. *Id.* at 21. Further, unlike the PPA agreement at issue here, the contract at issue in *Jackson Transit* lacked the federal government as a contractual party. *Id.* at 18 (finding the agreement at issue was between a union and a local transit authority). When the federal government contracts, however, its agreements are governed under federal common law. *See* 19 WRIGHT ET AL., at § 4515 & n.10.

Secretary to enter into agreements with Petitioners strengthens the position that the PPA should be enforced pursuant to federal common law.

Fourth, Petitioners' cries that the PPA's incorporation of provisions of § 256b into the contract turns this federal common law suit into an inferred-cause-of-action claim are to no avail. This Court held to the contrary in *Mobil Oil*, 530 U.S. 604 (2000). In *Mobil Oil*, the government entered into, and breached, contracts with petrochemical producers that incorporated several provisions of the Outer Continental Shelf Lands Act and attendant regulations as contractual promises. *Id.* at 614. Nevertheless, this Court enforced the provisions as a matter of contract law—not inferred-cause-of-action doctrine. *Id.* at 607 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.") (internal quotations omitted); *id.* at 614 (citing the RESTATEMENT (SECOND) OF CONTRACTS and leading contract treatises for the proposition that "relevant contract law entitles a contracting party to restitution if the other party 'substantially' breached a contract or communicated its intent to do so."); *see also Central Airlines*, 372 U.S. at 694 (enforcing collective-bargaining agreement as a matter of federal common law of contract even though many of the alternative-dispute-resolution provisions were statutorily required). The Court should adopt this same contract-law approach to the enforcement of the PPA and its incorporation of provisions of § 256b. Indeed, this contract-law approach seems especially apt here given that Congress mandated that HHS regulate pharmaceutical prices by way of contract.

See 42 U.S.C. § 256b(a)(1); *Seckinger*, 397 U.S. at 209–10 n.13; *Central Airlines*, 372 U.S. at 691–93.

II. EVEN IF SANTA CLARA'S FEDERAL COMMON LAW, THIRD-PARTY-BENEFICARY CLAIM IS VIEWED AS THE FUNCTIONAL EQUIVALENT OF INFERRING A CLAIM FROM § 256b, THIS COURT RETAINS THE ARTICLE III POWER TO INFER A CAUSE OF ACTION.

A. Petitioners' reliance upon *Alexander v. Sandoval* is misplaced because *Sandoval* addressed this Court's power to infer causes of action from *agency regulation*—not *statute*.

Arguing that Santa Clara's federal common law claim is the functional equivalent of a claim inferred from § 256b(a)(1) directly, Petitioners and their supporting *amici* (with the notable exception of the United States) suggest that *Sandoval*, 532 U.S. at 286–87, marks a *fait accompli* regarding the power of the federal courts to infer causes of action from federal statutes; *viz.*, they contend that *Sandoval* bars the practice. *See* Pet. Br. 18–20; PhRMA Br. 5–7; Chamber of Commerce Br. 8–9. Petitioners' reliance upon *Sandoval*, however, does not support their position that this Court lacks power to infer a third-party-beneficiary cause of action from § 256b, even if this Court views the finding of such a federal common law action to enforce the PPA as the functional equivalent of inferring a third-party action directly from the statute.[5]

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[5] As argued above, see *supra* pp. 7–14, *Amici* do not support the notion that this Court should deploy the same analysis to the task of finding a federal common law, third-party-

This Court's own precedent post-*Sandoval* belies Petitioners' view. Indeed, this Court has inferred a cause action from federal statute twice since the *Sandoval* opinion. *See Humphries*, 553 U.S. at 452–53 (inferring a retaliatory discrimination cause of action from 42 U.S.C. § 1981); *Jackson*, 544 U.S. at 177–78 (extending the inferred private right of action for Title IX suits to include retaliation claims and specifically rejecting the argument that *Sandoval* marked the end of the power of the federal courts to infer causes of action in appropriate cases); *see also* Thomas W. Merrill, *The Disposing of the Legislature*, 110 COLUM. L. REV. 452, 465–66 (2010) (reviewing the Court's contemporary inferred-cause-of-action doctrine and concluding that "no majority opinion has yet to enforce . . . [the] position that any cause of action must be found in the express language of the statute, not derived by inference from legislative history."). Indeed, it is informative in this regard to recognize that the United States, as *amicus* supporting Petitioners, refuses to endorse Petitioners' overly broad reading of *Sandoval*. *See* United States Br.

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beneficiary cause of action to enforce the PPA as it would use if it were determining whether to infer an action directly from § 256b. But even if this Court adopts Petitioners' equivalency position on the question of whether a third-party-beneficiary claim lies, *Amici* do not concede that the substantive elements of a federal common law, third-party-beneficiary claim would be the functional equivalent of an action inferred directly from § 256b. For instance, an action inferred directly from § 256b would likely attach duties to all producers of pharmaceuticals that meet statutory requirements, whereas a federal common law of contract claim could only be brought against signatories to the PPA. *See* RESTATEMENT (SECOND) CONTRACTS § 304 (limiting the scope of third-party-beneficiary claims to "promisors").

21–22 (mentioning *Sandoval* only twice in its brief and not for this expansive interpretation).

Indeed, *Humphries* and *Jackson* demonstrate that Petitioners erroneously elevate *dicta* that addressed statutory inferences in the *Sandoval* opinion above the actual holding of the case. The issue in *Sandoval* was whether a private, disparate-impact cause of action could be inferred from an *agency regulation*—not whether a cause of action could be inferred from a federal statute. *See Sandoval*, 532 U.S. at 278 ("This case presents the question whether private individuals may sue to enforce disparate-impact *regulations* promulgated under Title VI.") (emphasis added). The *Sandoval* Court held that a private right of action could not be inferred from the *agency regulation* at issue in that case. *See id.* at 291 ("[W]hen a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress.").

This case is not one in which Santa Clara seeks to infer a cause of action from an agency regulation. Even if this Court treats the determination of whether the federal common law of contract embraces the third-party enforcement of the PPA as the functional equivalent of inferring a third-party cause of action claim directly under § 256b, the Court's holding in *Sandoval* is not on point because such an inference would be one from statute—not regulation. *See Jackson*, 544 U.S. at 178 (rejecting the notion that *Sandoval* prohibits the inference of a cause of action

from a *statute* because "*Sandoval* held that private parties may not invoke Title VI *regulations* to obtain redress for disparate-impact discrimination.") (emphasis added).

B. The original meaning of Article III empowers this Court to infer a third-party-beneficiary cause of action from § 256b.

Even if this Court views the recognition of a federal common law, third-party-beneficiary claim to enforce the PPA as the functional equivalent of inferring a cause of action directly from § 256b, the original meaning of Article III judicial power confirms that this Court is authorized to infer a cause of action from § 256b. *See* U.S. CONST., Art. III § 1 (vesting the federal courts with "judicial power"). As a result, this Court should read the holding of *Sandoval* as limited to the question presented in that case—whether a court may infer causes of action from agency regulation. *See Sandoval*, 532 U.S. at 278. Adopting such a reading—as this Court did in *Jackson*, 544 U.S. at 178—best comports with the original meaning of Article III.

1. *English common law at the time of the Founding fully recognized the power of the courts to infer causes of action from statutes.*

The power of federal courts to infer causes of actions from statutes is inherent to the Anglo-American conception of judicial power as deployed by the Framers of Article III of the Constitution. Legal scholars agree that the power of the Anglo-American courts to infer causes of action was recognized more than seven centuries ago in the Statute of Westminster II. *See* 13 Edw. I, c. 50 (1285) (Eng.) ("Moreover,

concerning the Statutes provided where the Law faileth, and for Remedies, lest Suitors coming to the King's Court should depart from thence without Remedy, they shall have Writs provided in their Cases . . . .").[6] King's Bench, as early as 1703, held that courts of law are empowered to infer causes of action from statutes. *See Ashby*, 92 Eng. Rep. at 136–39 (inferring a cause of action for the failure to tally votes in a parliamentary election as directed by statute); *see also Couch v. Steel*, (1854) 118 Eng. Rep. 1193, 1196–98 (K.B.) (inferring a cause of action from a statute requiring merchant vessels to carry appropriate medicines while at sea); *Anonymous*, (1703) 87 Eng. Rep. 791, 791 (Q.B.) ("[W]here-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity."). Moreover, this practice of inferring causes of action at law is fully recognized in the leading Founding-era common law commentaries. *See, e.g.,* 1 COMYNS' DIGEST 442 (1822) ("So, in every case, where

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[6] There is a wealth of scholarly commentary on this front. *See, e.g.*, Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71 n.12 (2001) (tracing the power of the federal courts to infer causes of action from statutes to the Statute of Westminster II); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864 (1996) (arguing that common law courts had full authority to infer actions from statutes); Theodore F. T. Plucknett, *Case and the Statute of Westminster II*, 31 COLUM. L. REV. 778, 797–98 (1931) (discussing the attribution of the practice of inferring actions from statutes to the Statute of Westminster II).

a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law."); 3 W. Blackstone, COMMENTARIES *23, *51, *109, *123 (1769) (similar); 2 E. Coke, INSTITUTES ON THE LAWS OF ENGLAND 55 (6th ed. 1681) (similar).

2. *Early American common law opinions confirm the power of the courts to infer causes of action from statutes.*

This common law practice of inferring causes of action from statutes, moreover, was not limited to English practice. Antebellum decisions from state high courts, often citing English cases such as *Ashby*, further demonstrate that the power to infer a cause of action from a statute was part of the original understanding of Article III judicial power. *See, e.g.*, *Stearns v. Atl. & St. Lawrence R.R. Co.*, 46 Me. 95, 115 (1858) (citing *Ashby* for the proposition that the courts can provide remedies for injuries to statutory rights); *Stout v. Keyes*, 2 Doug. 184, 187 (Mich. 1845) ("It is a general principle of the common law, that whenever the law gives a right, or prohibits an injury, it also gives a remedy by action; and, where no specific remedy is given for an injury complained of, a remedy may be had by special action on the case."); *Calking v. Baldwin*, 4 Wend. 668, 671 (N.Y. Sup. Ct. 1830) (presenting as the general rule that "if a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable at common law, the party is not deprived of his common law remedy, but may elect to take it or that offered by the statute").

Furthermore, this Court has often relied upon inferred-cause-of-action jurisprudence's ancient lineage as precedent to infer a cause of action from federal statute. *See Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33, 39–40 (1916) (citing COMYNS' DIGEST, Blackstone, *Couch* and *Anonymous* as authority to infer a cause of action under Section 2 of the Safety Appliance Act of 1910); *see also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992) ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374 & n.52 (1982) (citing to *Rigsby* and Founding-era English authority that support the practice of inferring causes of action); *California v. Sierra Club*, 451 U.S. 287, 299–300 (1981) (Stevens, J., concurring) (noting that "implication of private causes of action was a well-known practice at common law and in American courts" and citing early English authorities); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 26 & n.2 (1979) (White, J., dissenting) (citing to *Rigsby* and Founding-era English authority that support the practice of inferring causes of action); *Cannon*, 441 U.S. at 689 & n.10 (same); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting) ("Courts . . . are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. A duty declared by Congress does not evaporate for want of a formulated sanction.") (citations omitted). At other times, this Court has attributed the power of the federal courts to infer causes of action from federal statutes as part

of the holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). *See, e.g., Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 742 (1989) (Brennan, J., dissenting) (listing five pre-*Rigsby* inferred cause of action cases, including *Marbury*); *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 569–70 (1930) (citing *Marbury* as authority to infer a cause of action from federal statute).

3. *This Court retains power to infer a third-party-beneficiary cause of action from § 256b, assuming Founding-era common law recognized third-party-beneficiary claims.*

Against this backdrop of the centuries-old tradition of Anglo-American courts' ability to infer causes of action from statute, it is clear that the original meaning of Article III judicial power encompasses the ability of federal courts to infer causes of action from federal statutes. *See* Bellia, 89 IOWA L. REV. at 838–51. *Ashby*, and the other leading Founding-era cases, lead to the conclusion that at that time, "[i]f a statute did not expressly confer a remedy on the plaintiff, a cause of action [at law] for its violation would lie . . . if one of the forms of action—e.g., debt, case, assumpsit—provided a remedy for the kind of injury that the statutory violation caused." *Id.* at 840–41; *accord Bullard v. Bell*, 4 F. Cas. 624, 639 (C.C.D.N.H. 1817) (No. 2,121) (Story, Circuit Justice) (holding that "[a]n action adapted to the nature of the case" must be "moulded according to the forms and distinctions of the common law").

While an original-meaning interpretation of Article III does not support an unfettered power to infer causes of action, the original understanding of Article III judicial power finds that when (1) the plaintiff has been injured in a manner that would have been re-

cognizable as an injury at Founding-era common law, and (2) the injury would have given rise to a Founding-era common law form of action to remedy it, a federal court is empowered to infer a cause of action from a federal statute. *Id.* at 851. Petitioners, and *amici* in support of Petitioners, therefore, improperly rely upon *dicta* in *Sandoval* for the proposition that the federal courts lack the power to infer a cause of action from § 256b. *See* Bellia, 89 IOWA. L. REV. at 851 (illustrating that this reading of *Sandoval* "does not squarely reflect the historical practice of English and state courts. . . . [T]hey did afford remedies . . . for some statutory violations, even remedies that legislatures had not expressly authorized, ... when that violation resulted in the kind of injury or wrong . . . that a form of action was available to remedy."). Rather, the best original-meaning interpretation of Article III shows that if Santa Clara could have brought a third-party-beneficiary claim at common law under a then-existing writ, this Court retains the power under Article III to infer such a cause of action under § 256b.

4. *Because Founding-era common law provided third-party beneficiaries relief by way of writ of assumpsit, this Court retains Article III authority to infer third-party-beneficiary claims under § 256b.*

A third-party-beneficiary claim, such as is at issue here, was remediable at common law by way of a writ of assumpsit. The right of third-party beneficiaries to enforce contracts by way of writ of assumpsit was well established at the time the Constitution was ratified. As early as 1677, King's Bench had adopted the doctrine of third-party-beneficiary enforcement of contract. *Dutton*, 83 Eng. Rep. 523

(holding a contract between a father and son, which intended to benefit the father's daughter, was enforceable by her via writ of assumpsit).[7] By the time of the Revolutionary War, third-party-beneficiary doctrine was so entrenched as a matter of English common law that Lord Mansfield thought the issue beyond questioning. *See Martyn v. Hind*, (1776) 98 Eng. Rep. 1174, 1178 (K.B.) (Lord Mansfield) (approving third-party-beneficiary enforcement under writ of assumpsit and stating "[a]s to the case of *Dutton versus Poole*, . . . it is matter of surprise, how a doubt could have arisen in that case.").

Antebellum American cases adopted third-party-beneficiary doctrine as well. As early as 1806, American courts, citing *Dutton*, held contracts enforceable by intended, third-party beneficiaries. *See Hind v. Watts*, 2 Watts 104 (Pa. 1833) (recognizing third-party-beneficiary claim); *Crocker v. Higgins*, 7 Conn. 342, 347 (1829) (citing *Dutton* and *Martyn* and holding in an equitable action seeking specific performance that "it is now established, that a third person may maintain a suit on a parol promise, made for his benefit, although he is not a party to the contract."); *Arnold v. Lyman*, 17 Mass. 400, 405 (1821) (affirming a verdict in assumpsit and holding "[g]enerally he for whose interest a promise is made, may maintain an action upon it, although the promise be made to another, and not to him."); *Cumberland v. Codrington*, 3 Johns. Ch. (NY) 299, 255 (1817) (Kent, Ch.) (citing *Dutton* for the proposition that "[i]t has been

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[7] Contract-law scholars regard *Dutton* as the seminal third-party-beneficiary case. *See, e.g.*, JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 577–78 (6th ed. Thomson Reuters 2009); E. ALLAN FARNSWORTH, CONTRACT 653–56 (4th ed. Aspen Publ. 2004).

held, that if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action at law on that promise."); *Schermerhorne v. Vanderheyden*, 1 Johns. Rep. 140 (N.Y. Sup. 1806) (per curiam) ("[W]e are of opinion, that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise. This was the doctrine of the King's Bench, in the case of *Dutton and wife v. Pool*, (2 Lev. 210.) affirmed in error. The same principle has, since that time, been repeatedly sanctioned by the decisions of the English courts.").

Given these authorities—when coupled with the congressional intent that § 340B agreements, such as the PPA, should be enforced pursuant to federal common law of contract, see *supra* pp. 7–14—there is no original-meaning Article III barrier to this Court recognizing Santa Clara's federal common law, third-party-beneficiary cause of action to enforce the PPA. Founding-era common law readily enforced third-party-beneficiary suits and, as a matter of original meaning of Article III judicial power, this Court is authorized to infer actions from statutes if plaintiff's statutory rights could have been enforced by way of such a common law writ. *See* Bellia, 88 IOWA L. REV. at 840–41. Therefore, even if this Court concludes that finding a federal common law, third-party-beneficiary cause of action to enforce the PPA is the functional equivalent of inferring a third-party cause of action directly under § 256b, this Court should find no Article III hurdle to affirming the court of appeals' ruling on such grounds. *See id.* at 851 (Founding-era courts "did afford remedies . . . for some statutory violations, even remedies that legislatures had not ex-

pressly authorized, ... when that violation resulted in the kind of injury or wrong . . . that a form of action was available to remedy."); *see also Transamerica*, 444 U.S. at 19 (holding as a matter of inferred-cause-of-action jurisprudence that "when Congress declared in § 215 that certain contracts are void, it intended that the customary [common law of contracts based] legal incidents of voidness would follow, including the availability of a suit for rescission, . . . injunction . . ., and for restitution.").

III. SANTA CLARA'S TRADITIONAL BREACH OF CONTRACT CAUSE OF ACTION TO ENFORCE THE PPA DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES.

The separation-of-powers concerns expressed by Petitioners and the Chamber of Commerce are without merit. *See* Pet. Br. at 17–19; Chamber of Commerce Br. 5. Petitioners and the Chamber of Commerce rely heavily upon selectively pruned language from *Stoneridge* in making their argument; namely: "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. . . ., conflict[ing] with the authority of Congress under Art. III to set the limits of federal jurisdiction.'" 552 U.S. at 164–65 (quoting *Cannon,* 441 U.S. at 746 (Powell, J., dissenting)). Nevertheless, this case is distinguishable from *Stoneridge* on congressional intent grounds and Justice Powell's *Cannon* dissent does not provide a sound basis for a separation-of-powers argument here.

Santa Clara's third-party-beneficiary claim is substantially distinguishable from *Stoneridge*. In *Stoneridge*, congressional intent to infer a cause of action from § 10b was lacking altogether. *Id.* at 158,

162–63, 166. Indeed, the Court in *Stoneridge* limited its discussion of separation of powers and inferred-cause-of-action doctrine to those situations where there was no congressional intent to create a private cause of action. 552 U.S. at 164. Here, by contrast, Congress's intent to enforce § 256b(a)(1) by way of a federal common law of contract cause of action is manifest. *See supra* pp. 7–14. The holding in *Stoneridge*, which declined to infer a cause of action in the face of no congressional intent, therefore, is not on point. *See Stoneridge*, 552 U.S. at 158, 162–63, & 166.

Petitioners, it seems, seek to have their cake and eat it too. On the one hand, they argue that recognizing Santa Clara's federal common law, third-party-beneficiary action to enforce the PPA is the functional equivalent of inferring a cause of action directly under § 256b. *See* Pet. Br. 21–25. Yet, on the other hand, they refuse to acknowledge the overwhelming indicia of congressional intent to enforce § 256b agreements by way of the federal common law of contract. *See* Pet. Br. at 42–45. Petitioners cannot have it both ways. If, as Petitioners and *amici* in support urge, finding a federal common law right to enforce the PPA is the functional equivalent of inferring a cause of action from § 256b directly, then the evidence of congressional intent to enforce § 256b agreements by way of the federal common law of contract, see *supra* pp. 7–14, should be viewed as the functional equivalent of congressional intent to infer a cause of action directly under § 256b. Even if this Court views the recognition of the federal common law, third-party-beneficiary enforcement of the PPA by Santa Clara through an inferred-cause-of-action lens, it should properly weigh Congress' intent to

create a federal common law of contract enforcement scheme in § 256b(a)(1). Such a weighing of congressional intent here is at odds with the lack of congressional intent found in *Stoneridge*. *See* 552 U.S. at 164.

Finally, the *Stoneridge* quotation selected by Petitioners and the Chamber of Commerce, 552 U.S. at 164–65, relies primarily upon Justice Powell's dissent in *Cannon*. *See Cannon,* 441 U.S. at 746 (Powell, J., dissenting). In *Cannon*, Justice Powell argued that only a federal cause of action may vest jurisdiction under 28 U.S.C. § 1331, rendering judicial inferences of a cause of action a jurisdiction-expanding act—contrary to separation-of-powers norms placing the control over lower federal court jurisdiction in Congress' hands. *See id.* at 745–46; *see also* Mulligan, 104 NW. U. L. REV. at 190 (elaborating on Justice Powell's position). Justice Powell's position is unpersuasive, however, because it rides upon an unreflective invocation of the so-called Holmes test, see *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.), that is not compatible with this Court's broader § 1331 doctrine.

Justice Powell's absolutist presentation of the Holmes test (*i.e.*, a federal cause of action is the sole necessary and sufficient condition for taking § 1331 jurisdiction) is not compatible with this Court's post-*Cannon* § 1331 jurisprudence. *See, e.g.,* Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1725 (2008) (concluding that the existence of a federal cause of action is neither a necessary nor sufficient condition for the vesting of § 1331 jurisdiction). The Court brought this incompatibility to the fore recently when it renewed its commitment to the rule that § 1331 juris-

diction may lie without a congressionally created, federal, cause of action. *See Grable & Sons*, 545 U.S. at 314 (holding that federal question jurisdiction may lie under § 1331 without a federal cause of action); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27–28 (1983) ("Congress has given the lower federal courts jurisdiction to hear . . . cases in which a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."); *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112 (1936) (noting that a federal question exists when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action"); *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 201–02 (1921) (same). This re-embrace of federal question jurisdiction without the need for a congressionally created cause of action undercuts Justice Powell's notion that inferring a cause of action from statute, including § 256b, violates separation of powers, because it rejects the major premise of the argument. *See* Mulligan, 104 NW. U. L. REV. at 203–05 (arguing that *Grable & Sons* undermines Justice Powell's position).

Justice Powell recognized as much in his *Cannon* dissent. *See Cannon,* 441 U.S. at 746 n.17 (Powell, J., dissenting). Citing *Smith*, Justice Powell found it "instructive to compare decisions implying private causes of action to those cases that have found non-federal causes of action cognizable by a federal court under § 1331." *Id.* He found that "the net effect [of bringing a non-federal cause of action under *Smith*] is the same as implication of a private action directly from the constitutional or statutory source of the fed-

eral law elements." *Id.* As a result, Justice Powell concluded that hearing suits such as *Smith* and *Grable & Sons* are, in his view, extra-jurisdictional in just the same manner as the inference of a federal cause of action. *Id.* Given the incompatibility of Justice Powell's separation-of-powers argument with *Smith*-style § 1331 jurisdiction, this Court precluded the adoption of Justice Powell's position by reaffirming that the federal courts may take § 1331 jurisdiction in certain cases without a congressionally created cause of action in *Grable & Sons*. 545 U.S. at 314. The combination, therefore, of congressional intent for federal common law enforcement of § 256b(a)(1) contracts, see *supra* pp. 7–14, coupled with the parsimonious construction of § 1331 doctrine in Justice Powell's *Cannon* dissent, lead *Amici* to the conclusion that there are no significant separation-of-powers concerns in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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