No. 21-806

IN THE

Supreme Court of the United States

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, *et al.*,

Petitioners,

v.

IVANKA TALEVSKI, PERSONAL REPRESENTATIVE OF THE ESTATE OF GORGI TALEVSKI, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF CONTRACT LAW AND LEGAL HISTORY PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

CHARLES C. BRIDGE
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

THOMAS G. SPRANKLING
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
2600 El Camino Real
Palo Alto, CA 94306
(650) 858-6000
thomas.sprankling@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

ENGLISH CASES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE

Amici are law professors who study legal history and/or contract law and who collectively share an interest in the proper use of history to determine the scope of contractual and statutory rights.[1]

Amicus Erwin Chemerinsky is Dean and Jesse H. Choper Distinguished Professor of Law at the University of California Berkeley School of Law.[2] He is the author of fourteen books and more than two hundred law review articles, spanning a wide range of topics in American law. In 2016, he was named a fellow of the American Academy of Arts and Sciences. In January 2021, he was named President-elect of the Association of American Law Schools.

Amicus Melvin Eisenberg is Jesse H. Choper Professor of Law, Emeritus, at the University of California Berkeley School of Law. A preeminent scholar of contract law, he is the author of myriad books and articles, including *The Nature of the Common Law* (1988) and contract law casebooks. Among other appointments, he is a fellow of the American Academy of Arts and Sciences and an adviser to the *Restatement (Third) of Agency* and *Restatement (Third) of Restitution*.

Amicus Brittany Farr is Assistant Professor of Law at the New York University School of Law, and a

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

[2] Dean Chemerinsky and his colleagues are appearing in their individual capacities. University affiliations are listed for identification purposes only.

former Sharswood Fellow at the University of Pennsylvania's Carey Law School. A scholar of private law and race with more than a decade of interdisciplinary training, she currently focuses on enslaved and free African Americans' use of contract law during the nineteenth and early twentieth centuries. Her writing has appeared in the *UCLA Law Review*, the *University of Chicago Law Review Online*, and many other academic publications.

Amicus Robert W. Gordon is Professor of Law, Emeritus, at Stanford University, and Chancellor Kent Professor of Law and Legal History, Emeritus, at Yale University. He has taught contract law for forty years and written many articles in the field. He is a past President of the American Society for Legal History and a Fellow of the American Academy of Arts and Sciences.

Amicus Ariela Gross is John B. and Alice R. Sharp Professor of Law and History at the USC Gould School of Law. A founder and co-director of the Center for Law, History, and Culture, she regularly teaches both Contracts and the History of American Law. Her most recent book (with Alejandro de la Fuente), *Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana*, won the John Philip Reid Book Award from the American Society for Legal History for the best book by a mid-career or senior scholar on Anglo-American Legal History, and the Order of the Coif Award for the best book on law. She is a Fellow of the Society of American Historians, a former Chair of the Legal History Section of the American Association of Law Schools, and a board member of the American Society of Legal History.

Amicus Joy Milligan is the Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law at the University of Virginia School of Law. Her interdisciplinary scholarship, drawing on social science and legal history methods, has been published in the *University of Chicago Law Review*, the *Yale Law Journal*, the *Virginia Law Review*, the *UCLA Law Review*, the *NYU Law Review*, *the Annual Review of Law & Social Science*, and the *Journal of Legal Education*.

Amicus Lea VanderVelde is University Distinguished Professor at the University of Iowa College of Law. She has conducted extensive research in the field of nineteenth-century American legal history, including her work as Director of the Reconstruction Amendment Optical Scanning project. She received the Guggenheim fellowship in Constitutional Studies for 2011, the May Brodbeck Humanities fellowship for 2019, and the 2020 Brophy Prize for best article in legal history published in the American Journal of Legal History. She is a life fellow of the American Law Institute.

Amicus Sarah Winsberg is an Assistant Professor of Law at Brooklyn Law School. Her research in legal history examines the process of making legal categories and uses history to offer deep insight into the theory of private law. Professor Winsberg's scholarship has appeared in the *Notre Dame Law Review* and in *Legal Ethics*, where her article received the Deborah Rhode Early Career Scholar Paper Prize.

Amici's interest in this case springs from petitioners' assertion that "the common law" "generally [did] not" "recognize[] a right of third-party beneficiaries to bring suit when Section 1983 was enacted." Pet. Br. 13. Respectfully, petitioners are mistaken, and amici write to correct the record. In doing so, amici take no posi-

tion on whether history alone controls the scope of a private right of action under Section 1983. Rather, amici's interest is in offering an accurate picture of the underlying history. That history shows that when Section 1983 was enacted and amended in the early 1870s, most States recognized a third-party beneficiary's right to bring suit on a contract.

SUMMARY OF ARGUMENT

The right of a third-party beneficiary to bring suit was well-established at common law as early as the seventeenth century. Indeed, even in situations where courts of law were reluctant to permit a third-party beneficiary to sue, courts of equity had no compunction about allowing such a suit to proceed where doing so would serve justice.

While English courts began to take a more restrictive approach by the nineteenth century, a majority of American jurisdictions continued to permit third-party beneficiaries to sue through at least the early 1870s—i.e., the period when Section 1983 was enacted (in 1871) and amended (in 1874). This Court recognized as much in 1876, when it explained that the "right of a party to maintain [suit] on a promise … made to another for his benefit … is now the prevailing rule in this country." *See Hendrick* v. *Lindsay*, 93 U.S. 143, 149 (1876) (citing Parsons, *The Law of Contracts* 467 (6th ed. 1873)). Modern-day scholarship has confirmed that this Court's summary of the law was accurate. A review of over three hundred appellate decisions from the 19th century—essentially, the "universe" of such cases—confirms that a clear majority of States permitted contract actions by third-party beneficiaries during that period. *See* Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and*

Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case, 9 Law & Hist. Rev. 327, 331, 333 (1991).

Petitioners are incorrect to assert that the American common law "generally [did] not" recognize a third-party beneficiary's right to bring suit on a contract. Pet. Br. 13. While some States did take such an approach, they were in the minority. The secondary sources that petitioners rely upon for this point are largely from the 1880s or later—and thus are irrelevant to the state of the law when Section 1983 was adopted and enacted. The remaining secondary sources are quoted out of context or, unfortunately, simply misrepresented.

ARGUMENT

I. THE "PREVAILING RULE" IN AMERICAN COMMON LAW IN THE 1870S PERMITTED THIRD-PARTY BENEFICIARIES TO SUE

A. In The Seventeenth And Eighteenth Centuries, English Courts Developed A Range Of Tools To Help Third-Party Beneficiaries Enforce Promises Made For Their Benefit

Before the nineteenth century, judges and lawyers did not think of contract law as a monolith—there was no "unitary law of contract." Ibbetson & Swain, *Third Party Beneficiaries in English Law: From* Dutton v. Poole *to* Tweddle v. Atkinson, in *Ius Quaesitum Tertio* 191, 191 (Schrage ed., 2008). Rather, promises were enforced in courts of law via various forms of action, which straddled the boundaries of what are now recognized as the distinct subjects of tort, contract, and property. *See id.* at 191-192. Courts of equity, in turn,

developed their own, separate body of contractual rules. *See id.* at 201-205.

Regardless of whether law or equity was invoked, however, third parties generally could enforce an agreement made for their benefit. The roots of that principle "run as deep as the fifteenth century." Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 334. And "[s]upport for a third party right of action" in contract cases was "both voluminous and continuous" in English legal sources from the mid-seventeenth to early nineteenth centuries. Flannigan, *Privity: The End of an Era (Error)*, 103 L. Q. Rev. 564, 567 (1987).

1. In early English law, many important agreements were made "under seal"—literally sealed, and authenticated with the wax impression of a signet ring. *See Williston on Contracts* §§ 1:8, 2.2 (4th ed. May 2022 Update). Such sealed contracts could be enforced only by the parties who had signed the document. *See* Ibbetson & Swain, *Third Party Beneficiaries*, at 192-193; Hallebeek & Dondorp, *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* 100-104 (2008). However, sealed contracts decreased in importance over time and were effectively replaced by the assumpsit form of action.[3]

Assumpsit permitted the enforcement of unsealed agreements and "heralded the onset of modern contract law." Teeven, *Mansfield's Reform of Consideration in Light of the Origins of the Doctrine*, 21 Mem. St. U. L.

[3] By the middle of the nineteenth century, common law courts treated the special distinctions arising from the seal with "merited contempt." *Drumright* v. *Philpot*, 16 Ga. 424, 429 (1854). Today seals retain their importance for only a handful of specialized documents, and many jurisdictions have abolished them entirely. *See Williston on Contracts* §§ 2:15, 2.17, 37.4.

Rev. 669, 679 (1991). In practice, assumpsit was "viewed essentially as a breach of promise action." Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 335. Indeed, the word assumpsit literally means "he has undertaken." *See* Dobbs, *Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress*, 50 Ariz. L. Rev. 49, 65 (2008).

Because assumpsit focused on the person making the promise rather than the person receiving the promise, third parties frequently enforced agreements made for their benefit in assumpsit actions. *See* Ibbetson & Swain, *Third Party Beneficiaries*, at 192, 198-199. One early case, for example, held that "the party to whom the benefit of a promise accrues may bring his action." *Provender* v. *Wood*, (1627) 124 Eng. Rep. 318 (Ct. Comm. Pl.).

The development of assumpsit coincided with the rise of the doctrine of consideration. Over time, courts hearing assumpsit actions developed a general rule that "a person could sue only if the consideration had been provided by him or her." Ibbetson & Swain, *Third Party Beneficiaries*, at 192; *see id.* at 196-200. In practice, however, the consideration requirement did not necessarily bar a third-party beneficiary from bringing suit, for courts were willing to hold that "nominal consideration" was sufficient, or "infer[red] the existence of consideration on relatively flimsy evidence." Hallebeek & Dondorp, *Contracts for a Third-Party Beneficiary*, at 116. Put slightly differently, the consideration rule did not preclude a third-party beneficiary from bringing suit because the beneficiary "might yet be able to assert that the defendant had received a benefit in return for the promise and might even be able to assert some appropriate loss or burden to himself." Baker, *Privity of Contract in the Common Law Before 1860*, in *Ius Quaesitum Tertio* 35, 42 (Schrage ed., 2008).

For example, in the landmark case of *Dutton* v. *Poole*, (1678) 89 Eng. Rep. 352 (K.B.), a son had entered into a contract with his father under which (1) the father agreed not to cut down a woodland that he intended to bequeath to the son, and in return (2) the son agreed to make a payment to his sister when she married.[4] Although the father performed his side of the bargain, he died before the sister's marriage, and the son later refused to make the required payment. The sister was subsequently permitted to sue her brother to enforce the contract, even though she had provided no consideration. *See* Ibbetson & Swain, *Third Party Beneficiaries*, at 197-198 (quoting Exchequer Chamber's decision in *Dutton* as stating that "[t]he party to have the benefit may have the action; or the party from which the consideration moved; but not both.").

In the eighteenth century, jurists and commentators continued to take a broad view of a third-party beneficiary's ability to bring suit. *See* Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 335-336. A 1711 case, for example, echoed *Dutton*'s sweeping language: "'If the promise is made for my benefit [then] I may maintain an ac[t]ion for that promise.'" Ibbetson & Swain, *Third Party Beneficiaries*, at 198 n.42 (citation omitted). In his 1767 treatise, attorney Francis Buller noted that courts in recent decades had been "more liberal than forme[r]ly in extending the Benefit" of assumpsit to third parties. Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 132 (1772). And in *Martyn* v. *Hind*, (1779) 99 Eng. Rep. 94 (K.B.), Lord Mansfield "expressed his surprise as to 'how a doubt could have arisen'" about the outcome in *Dut-*

[4] There are multiple reports of *Dutton* at various stages of review. *See* Ibbetson & Swain, *Third Party Beneficiaries*, at 197.

ton—a remark that "has been taken to be an approval of the general right of a third party to bring an action." Flannigan, *Privity*, 103 L. Q. Rev. at 566-567.

2. Even when common law courts did exclude third parties as "strangers to the consideration," *see, e.g.*, *Crow* v. *Rogers*, (1724) 93 Eng. Rep. 719, 720 (K.B.), there remained "the possibility that the [third-party] beneficiary might bring a suit in Equity to enforce the contract," Ibbetson & Swain, *Third Party Beneficiaries*, at 203. Courts of equity frequently protected third-party interests in both sealed and unsealed agreements. *See id.* at 201-205. And throughout the eighteenth century, "equity continued to expand the beneficiary action through a variety of means." Palmer, *The Paths to Privity: The History of the Third Party Beneficiary Contracts at English Law* 158 (1992); *see also* Corbin, *Contracts for the Benefit of Third Persons*, 27 Yale L. J. 1008, 1008 (1918) ("If without privity of contract, one may become indebted to another, the lack of privity is surely no reason for denying [the third party] a beneficial right. As usual, equity saw this long before the common law did.").

For example, equity courts sometimes enforced agreements for third parties by inferring a "constructive trust." *See* Palmer, *Paths to Privity*, at 129-130. The idea underlying this doctrine was that, by agreeing to perform for a third party's benefit, the promisor had effectively made himself a trustee of that third party's equitable property and could be obliged to deliver. *See id.* Alternatively, courts of equity had the power to "order a party to a contract to sue at law" on behalf of the third party, "or to assign his claim … allowing a third-party beneficiary to bring the action" in a common law court. Hallebeek & Dondorp, *Contracts For a Third-Party Beneficiary*, at 108. Finally, and most

straightforwardly, an equity court "might itself hear a claim by the non-party beneficiary." *Id.*; *see, e.g.*, *Gregory* v. *Williams*, (1817) 36 Eng. Rep. 224 (Ct. Ch.); *Tomlinson* v. *Gill*, (1756) 27 Eng. Rep. 221 (Ct. Ch.).

B. Nineteenth-Century American Courts Mostly Followed The Traditional Practice Of Permitting Third-Party Suits

In the nineteenth century, after the United States had won its independence and American courts had begun to develop their own body of common law, the English and American contract law doctrines diverged. English courts began to disfavor permitting third-party beneficiaries to sue. *See* Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 337. That doctrinal shift reached its zenith in 1861, when England's highest court—the Queen's Bench—held that assumpsit did not permit a "stranger to the consideration" to sue. *See id.* at 338 (discussing *Tweddle* v. *Atkinson*, (1861) 121 Eng. Rep. 762 (Q.B.)).

American courts, however, remained friendly to third-party suits for most of the nineteenth century. To be sure, some variation existed across the various States' high courts, as naturally occurs in any common law system. *See* Corbin, *Contracts for the Benefit of Third Persons in the Federal Courts*, 39 Yale L.J. 601, 601 (1930) ("[T]he law of no subject can long remain 'common' to fifty jurisdictions[.]"). But a modern-day survey of 304 nineteenth-century American appellate cases—a collection that the survey's author asserted "must be close to the total universe of such appellate cases" in the pre-1900 time period—concluded that a clear majority of those cases permitted third-party

beneficiaries to sue. *See* Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 331, 333.[5]

Specifically, in the first two decades of the nineteenth century, "the high courts of the first four American jurisdictions to address the problem spoke as one in applying 'the decisions of the English courts,'"—*i.e.*, "that 'when a promise is made to one, for the benefit of another, he for whose benefit it is made may bring an action for the breach.'" Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 340 & n.64 (collecting cases from this Court, Louisiana, Massachusetts, and New York).

For example, Chief Justice Marshall himself explained in 1806 that "if money be delivered by A. to B. to be paid over to C. although no promise is made by B. to C. yet C. may recover the money from B. by an action of assumpsit." *Lawrason* v. *Mason*, 7 U.S. (3 Cranch) 492, 495 (1806). Similarly, the Massachusetts Supreme Judicial Court concluded that "when a promise is made to one, for the benefit of another, he for whose benefit it is made may bring an action for the breach." *Felton* v. *Dickinson*, 10 Mass. 287, 290 (1813). By 1846, a New York court summarized—after a survey of the case law and secondary sources—that it was "now well settled, as a general rule, that in cases of simple contracts, if one person makes a promise to another, for the benefit of a third, the third may maintain

---

[5] Professor Karsten's empirical analysis shows that petitioners are mistaken in asserting that nineteenth-century American courts "almost uniformly" turned away third-party beneficiaries' suits. Pet. Br. 15. It also demonstrates that third-party beneficiary suits were hardly uncommon or limited to "highly unusual contracts," *Cummings* v. *Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1576 (2022), and in fact were "'normally available for contract actions'" in most States, *id.* at 1572.

an action upon it." *Barker* v. *Bucklin*, 2 Denio 45, 53, 1846 WL 4209 (N.Y. Sup. Ct. 1846) (quotation marks omitted); *see also id.* at 56 (discussing case law from Massachusetts, Connecticut, and Pennsylvania supporting this "well-settled" proposition).

By the 1850s, the third-party beneficiary principle was sufficiently established that Harvard law professor Theophilus Parsons Jr. deemed it "safe" to describe it as the "prevailing rule" in American common law. Parsons, *The Law of Contracts* 390 (1st ed. 1853). This statement was highly significant, as Professor Parsons' treatise was not only one of "[t]he best known and most influential works" in mid-nineteenth-century America, Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 Mich. L. Rev. 1406, 1408-1409 (1987), but also "'sold more copies than any other treatise' of the nineteenth century" regardless of subject matter, Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 376 n.150 (quoting Friedman, *A History of American Law* 624 (2d ed. 1985)). A number of state high courts subsequently relied on Parsons in holding that a third-party beneficiary has the right to sue. *See, e.g.*, *Sweatman* v. *Parker*, 49 Miss. 19, 31 (1873); *Meyer* v. *Lowell*, 44 Mo. 328, 330 (1869); *Sanders* v. *Clason*, 13 Minn. 379, 382 (1868); *Alcalda* v. *Morales*, 3 Nev. 132, 137 (1867); *Small* v. *Schaefer*, 24 Md. 143, 158 (1866).

Around the same time, many States began to merge the procedural systems of law and equity. By 1870, at least twenty-four states had in some form adopted the "Field Code," which included that merger. *See* Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 Colum. L. Rev. 1, 9-10 & n.14 (1989). One result of this development was that even state high courts that harbored some skepticism

about third-party suits *at law* nonetheless permitted injured third parties to recover on *equitable* theories of relief—much as English courts had done in prior centuries. *See supra* pp.9-10.

This point is illustrated by *Davis* v. *Calloway*, 30 Ind. 112 (1868). In *Davis*, a man who owed the plaintiff $100 for legal services had contracted with the defendant, agreeing to perform certain tasks in exchange for the defendant's agreement to pay the plaintiff $100. *Id.* at 112-113. When defendant failed to pay, plaintiff brought suit despite being only a third-party beneficiary of the contract. *Id.* The Supreme Court of Indiana held that the creditor-plaintiff "could maintain an action on the [defendant's] promise," *id.* at 113, reasoning that "the complaint c[ould] be regarded as a bill in chancery under the old practice" and that "[i]n equity, [the plaintiff] had the right to enforce the promise of [the defendant] to pay the debt due him," *id.* at 114.[6]

Indiana was not alone in following this path. The high courts in States ranging from Georgia to Iowa to Pennsylvania took a similar approach. *See, e.g.*, *Ford* v. *Finney*, 35 Ga. 258, 260-261 (1866); *Scott's Adm'rs* v. *Gill*, 19 Iowa 187, 188 (1865); *see also* Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 349. So too

[6] Petitioners cite *Conklin* v. *Smith*, 7 Ind. 107 (1855), as an example of a nineteenth-century decision rejecting a third-party suit. But the Indiana courts "abandoned" *Conklin* and similar cases, prior to Section 1983's enactment, in favor of the prevailing rule permitting third-party suits. Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 348 ("By the outbreak of the Civil War, Indiana's high court was signalling the end to the defense of privity of contract … . One is led to conclude that Indiana's court abandoned its English doctrinal rule."); *see also, e.g.*, *Davis*, 30 Ind. at 113-114; *Day* v. *Patterson*, 18 Ind. 114, 117 (1862) ("[I]t is settled in Indiana that a party may sue upon a promise made to a third person for his benefit.").

did this Court, which explained that it could circumvent any "doubt" about the availability of a breach-of-contract action at law "in the name of the [third party] to whom payment is to be made," because "this is a case in chancery, and no one has doubted that in equity, such a contract may be enforced." *Thredgill* v. *Pintard*, 53 U.S. (12 How.) 24, 38 (1851).

By 1859, seventeen American jurisdictions allowed third-party beneficiaries to sue; only seven either did not permit such suits or "severely limited" them. Karsten, 9 Law & Hist. Rev. at 340 & nn.66-67 (collecting cases). In the following years, that imbalance persisted. Of the sixteen States that addressed the third-party beneficiary rule for the first time between 1860 and 1900, eight followed the majority rule, five "allow[ed] the suits in some cases but not others," and only three rejected it outright. Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 353.[7] And although a small handful of States had retreated from the American "prevailing rule" by 1871, *see, e.g.*, *Flint* v. *Pierce*, 99 Mass. 68, 71 (1868), that rule remained the clear majority position among state high courts at the time of Section 1983's enactment and amendment. *See* Resp. Br. App'x at 1a-4a; *see also* 2 Kent, *Commentaries on American Law* 464 n.(e) (Holmes, Jr., ed., 12th ed. 1873) (it is "now settled that, in a case of simple con-

[7] Professor Karsten's work also indicates that petitioners are mistaken in arguing (at 17-18) that the rights of donee beneficiaries—as opposed to creditor beneficiaries—developed more slowly and were not established until the twentieth century. If anything, nineteenth-century courts were *more* permissive of donee-beneficiary suits. *See* Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 333 (finding that 60.3% of creditor beneficiaries and 75.9% of donee beneficiaries were permitted to sue in nineteenth-century appellate cases).

tract, if one person makes a promise to another for the benefit of a third party, the third party may maintain an action upon it").[8]

Ultimately, this Court recognized the continuing vitality of the "prevailing rule" in 1876—just a few years after Section 1983 was enacted—stating that "the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the *prevailing rule* in this country." *Hendrick*, 93 U.S. at 149 (emphasis added) (citing Parsons, *The Law of Contracts*, at 467).[9]

C. Petitioners' Description Of The Evolution Of The Third-Party Beneficiary Doctrine Is Flawed

Petitioners' brief grapples with little of the history discussed above. Although they identify decisions from eleven States that barred a third-party beneficiary from filing suit, Pet. Br. 15-16, that relatively small sample size does not define the broader common law tapestry. Moreover, a number of their cases post-date 1874, rendering them irrelevant to determining the state of the law when Section 1983 was enacted and

---

[8] Petitioners (at 14) rely on language from Holmes's 1881 book *The Common Law*. But the cited passages are part of a discussion regarding the transfer of contractual rights, not third-party beneficiary suits. *See* Holmes, Jr., *The Common Law* 340-341, 354 (1881); *see also* U.S. Br. 19 n.3 (making this point).

[9] Petitioners' brief does not mention *Hendrick*. And their reliance (at 16) on this Court's decision in *Second National Bank* v. *Grand Lodge*, 98 U.S. 123, 124-125 (1878), is misplaced. That decision merely noted that while "the general rule is that … privity must exist, … there are confessedly many exceptions to it"—such as suits where "assets have come to the promisor's hands or under his control which in equity belong to a third person." *Id.* at 124.

amended. For example, petitioners cite one case from Wyoming, which was not even admitted as a State until 1890. *Id.* at 16. They also cite cases from three States—Minnesota, Georgia, and Indiana—that appear to have permitted third-party beneficiaries to bring suit at least as of 1874.[10]

In an attempt to provide perspective on general practices, petitioners rely on two basic categories of secondary sources: (1) those that they misquote, and/or (2) those that are from the 1880s or significantly later. As to the former, petitioners are wrong to suggest that Hilliard's, Wharton's, and Story's treatises directly support their position. *See* Pet. Br. 13-15 & n.2. To the contrary, Hilliard's *Law of Contracts* states that there are "many cases in the books, which must be regarded as maintaining the *general proposition*, that one party, for whose benefit a promise has been made to another, may himself maintain an action against the promisor." 1 Hilliard, *The Law of Contracts* ch. XIII, § 6, at 426-427 (1872) (emphasis added). Similarly, Wharton's *Commentary on the Law of Contracts* recognizes that "[i]n this county *the preponderance of authority* is to the effect that a party may bring suit on a simple contract to which he is not a party when it contains a provision for his benefit." Wharton, *Commentary on the*

[10] Specifically, Minnesota permitted third-party beneficiaries to bring suit at least as of 1868, *see Sanders*, 13 Minn. at 382, and the earliest case that petitioners rely upon was not issued until 1893, *see Jefferson* v. *Asch*, 55 N.W. 604 (Minn. 1893)). Similarly, Georgia permitted a third-party suit (at least in equity) as of 1866 and the earliest case that petitioners cite issued in 1875 (and, in any event, expressly declined to resolve whether the plaintiff could pursue a suit in equity). *Compare Ford*, 35 Ga. at 261, *with Empire State Ins. Co.* v. *Collins*, 54 Ga. 376 (1875). Finally, as discussed, Indiana courts abandoned the *Conklin* rule long before Section 1983's enactment and amendment.

Law of Contracts ch. XXVI, § 785, at 160-161 (1882) (emphasis added).

Petitioners' citations to William Story, too, are misleading. As to the 1844 edition of Story's treatise, petitioners are simply wrong that it stated that the "'general rule'" was that third-party beneficiaries were not permitted to bring suit. Pet. Br. 13. The "general rule" that Story was describing was simply that consideration is sufficient to form a valid contract "if one person make a promise to another for the benefit of a third, although no consideration move from such third person." Story, *Treatise on the Law of Contracts Not Under Seal* ch. IV, § 130, at 82 (1844). Although petitioners attempt to disguise the jump to a different doctrine with an ellipsis, in context it is clear that Story stated merely that the third-party beneficiary question at issue in this case was a point of "difficulty" and noted that there were "quite contradictory" English and American cases on either side of the question. *Id.*[11]

As to the latter category of secondary sources (*i.e.*, those from 1880 or later), it is true that there was movement during that time towards a more formalist approach to contract law, led by Harvard Law Professor Christopher Langdell. *See* Teeven, *A History of the Anglo-American Common Law of Contract* 218-219 (1990); *see also* Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1365-1366 (1992) (discussing

[11] The 1874 edition of Story's treatise did note with approval the English courts' abandonment of third-party suits and described a "tendency of [American] courts" in the same direction." Story, *A Treatise on the Law of Contracts* ch. XVII, § 552, at 509 (Bigelow ed., 1874). However, nothing in that passage indicates that this nascent "tendency" had turned the American majority view—that third-party beneficiary suits were permissible—into a minority view.

the academic ascendance of the "classical contract school" in the final years of the nineteenth century). But at least as of when Professor Langdell's *Summary of the Law of Contracts* was published in 1880, it was less a summary and more a normative description of what Langdell wished that law to become. Indeed, the portion of his work cited by petitioners discusses not American law, but rather the English courts' retreat from, and eventual overruling of, the doctrine of *Dutton* v. *Poole*. *See* Langdell, *A Summary of the Law of Contracts* 79-80 (2d ed. 1880); *see also supra* pp.8-9 (discussing *Dutton*).[12]

The doctrinal shift that Professor Langdell sought to bring about occurred in the 1880s and 1890s—well after Section 1983's enactment. The New York cases that petitioners cite when discussing *Lawrence* v. *Fox*, 20 N.Y. 268 (1859), are instructive. Pet. Br. 17 (citing *Vrooman* v. *Turner*, 69 N.Y. 280 (1877), and *Wheat* v. *Rice*, 97 N.Y. 296 (1884)). It is true that those cases marked a doctrinal retreat from *Lawrence* and narrowed the scope of third-party suits. *See*, *e.g.*, Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. at 1368-1371 (describing this retreat, while noting that the broader trend toward formalism was "mistaken on both the substantive and technical levels"). But both decisions were issued years after Section 1983's enactment

[12] Langdell's influence on contract law was short-lived. Although some state high courts adopted the formalist English approach in the latter half of the nineteenth century and barred third-party suits, *see* Karsten, *The "Discovery" of Law*, 9 Law & Hist. Rev. at 344-348, the "tide" soon "turned back," Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. at 1367. Within a few decades, Massachusetts was the only State still maintaining, at least nominally, a clear rule against third-party suits. *See id.* at 1367 & n.43.

in 1871 and amendment in 1874—the relevant points in time for assessing common law rules of contract, under petitioners' own theory of the case. *See* Pet. Br. 12.[13]

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted.

CHARLES C. BRIDGE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

THOMAS G. SPRANKLING
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real
Palo Alto, CA 94306
(650) 858-6000
thomas.sprankling
@wilmerhale.com

SEPTEMBER 2022

[13] Similarly, with respect to government contracts, petitioners purport to describe and synthesize "[c]ontemporaneous contract law," Pet. Br. 20, but conspicuously fail to cite any pre-1874 case supporting what they assert was a "strong[] common law rule" at the time of Section 1983's enactment and amendment, *id.* at 18; *see* U.S. Br. 19-20. Instead, petitioners rely on untimely sources: a selective quotation from the 1932 edition of the First Restatement, *see id.* at 18, 22, a handful of cases from 1880 or later, *see id.* at 19-20, and a New York case from 1928, *see id.* at 21-22.